

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 10-13164-cgm

4 - - - - - x

5 In the Matter of:

6

7 FAIRFIELD SENTRY LIMITED and NOMURA INTERNATIONAL PLC,

8 Debtors.

9 - - - - - x

10 Adv. Case No. 10-03622-cgm

11 - - - - - x

12 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

13 Plaintiffs,

14 v.

15 CITIBANK NA LONDON et al.

16 Defendants.

17 - - - - - x

18 Adv. Case No. 10-03626-cgm

19 - - - - - x

20 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

21 Plaintiffs,

22 v.

23 BGL BNP PARIBAS, S.A. et al.,

24 Defendants.

25 - - - - - x

1 Adv. Case No. 10-03627-cgm

2 - - - - - x

3 KRYs et al.,

4 Plaintiffs,

5 v.

6 BNP PARIBAS SECURITIES SERVICES LUXEMBOURG et al.,

7 Defendants.

8 - - - - - x

9 Adv. Case No. 10-03630-cgm

10 - - - - - x

11 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

12 Plaintiff,

13 v.

14 HSBC SECURITIES SERVICES (LUXEMBOURG) SA et al.,

15 Defendants.

16 - - - - - x

17 Adv. Case No. 10-03633-cgm

18 - - - - - x

19 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

20 Plaintiffs,

21 v.

22 HSBC PRIVATE BANK (SUISSE) SA et al.,

23 Defendants.

24 - - - - - x

25

1 Adv. Case No. 10-03634-cgm
2 - - - - - x
3 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,
4 Plaintiffs,
5 v.
6 ZURICH CAPITAL MARKETS COMPANY et al.,
7 Defendants.
8 - - - - - x
9 Adv. Case No. 10-03635-cgm
10 - - - - - x
11 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,
12 Plaintiffs,
13 v.
14 UNION BANCAIRE PRIVEE, UBP SA et al.,
15 Defendants.
16 - - - - - x
17 Adv. Case No. 10-03636-cgm
18 - - - - - x
19 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,
20 Plaintiffs,
21 v.
22 UNION BANCAIRE PRIVEE, UBP SA et al.
23 Defendants.
24 - - - - - x
25

1 Adv. Case No. 10-03780-cgm

2 - - - - - x

3 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

4 Plaintiffs,

5 v.

6 UBS AG NEW YORK et al.,

7 Defendants.

8 - - - - - x

9 Adv. Case No. 10-04098-cgm

10 - - - - - x

11 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

12 Plaintiffs,

13 v.

14 BNP PARIBAS ARBITRAGE SNC et al.,

15 Defendants.

16 - - - - - x

17 Adv. Case No. 10-04099-cgm

18 - - - - - x

19 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

20 Plaintiffs,

21 v.

22 BNP PARIBAS PRIVATE BANK AND TRUST CAYMAN Ltd. et al.,

23 Defendants.

24 - - - - - x

25

1 Adv. Case No. 11-01250-cgm
2 - - - - - x
3 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,
4 Plaintiffs,
5 v.
6 UBS LUXEMBOURG SA et al.,
7 Defendants.
8 - - - - - x
9 Adv. Case No. 11-01463-cgm
10 - - - - - x
11 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,
12 Plaintiffs,
13 v.
14 MERRILL LYNCH INTERNATIONAL et al.,
15 Defendants.
16 - - - - - x
17 Adv. Case No. 11-01579-cgm
18 - - - - - x
19 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,
20 Plaintiffs,
21 v.
22 BNP PARIBAS SECURITIES NOMINEES Ltd. et al.,
23 Defendants.
24 - - - - - x
25

1 Adv. Case No. 11-01617-cgm

2 - - - - - x

3 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

4 Plaintiffs,

5 v.

6 FORTIS BANK SA/NV et al.,

7 Defendants.

8 - - - - - x

9 Adv. Case No. 11-02770-cgm

10 - - - - - x

11 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.

12 Plaintiffs,

13 v.

14 CITIGROUP GLOBAL MARKETS LIMITED et al.,

15 Defendants.

16 - - - - - x

17 Adv. Case No. 12-01551-cgm

18 - - - - - x

19 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.

20 Plaintiffs,

21 v.

22 BNP PARIBAS ESPANA f/k/a FORTIS BANK (ESPANA) et al.,

23 Defendants.

24 - - - - - x

25

1 United States Bankruptcy Court
2 355 Main Street
3 Poughkeepsie, NY 12601
4

5 July 28, 2021

6 10:48 AM
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21 B E F O R E :
22 HON CECELIA G. MORRIS
23 U.S. BANKRUPTCY JUDGE
24

25 ECRO: UNKNOWN

1 HEARING re Adversary proceeding: 10-03622-cgm Fairfield
2 Sentry Limited (In Liquidation) et al v. Citibank NA London
3 et al
4 Doc# 116 Motion to Amend and File the Further Proposed
5 Amended-Complaints in the Knowledge Actions filed by David
6 Elsberg on behalf of Fairfield Sentry Limited (In
7 Liquidation), Fairfield Sentry Limited (In Liquidation),
8 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
9 and Greig Mitchell, solely in their capacities as Foreign
10 Representatives and Liquidators thereof

11
12 HEARING re Adversary proceeding: 10-03626-cgm Fairfield
13 Sentry Limited (In Liquidation) et al v. BGL BNP Paribas,
14 S.A. et al
15 Doc# 83 Motion to Amend and File the Further-Proposed
16 Amended Complaints in the Knowledge Actions filed by David
17 Elsberg on behalf of Fairfield Sentry Limited (In
18 Liquidate), Fairfield Sigma. Limited (In Liquidation),
19 Fairfield- Lambda Limited (In Liquidation), and Kenneth Krys
20 and Greig Mitchell, solely in their capacities as Foreign
21 Representatives and Liquidators thereof

22
23 HEARING re Adversary proceeding:.10-03627-cgm Krys et al v.
24 BNP Paribas Securities Services Luxembourg et al
25 Doc# 133 Motion to Amend and File the Further Proposed

1 Amended Complaints in the Knowledge Actions filed by David
2 Elsberg; on behalf of Fairfield Sentry Limited (In
3 Liquidation), Fairfield Sigma Limited (In Liquidation),
4 Fairfield -Lambda Limited (In Liquidation), and Kenneth Krys
5 and Greig Mitchell, solely in their capacities as Foreign
6 Representatives and Liquidators thereof HEARING re
7
8 HEARING re Adversary proceeding: 10-03630-cgm Fairfield
9 Sentry Limited (In Liquidation) et al v. HSBC Securities
10 Services (Luxembourg) SA et al
11 Doc# 146 Motion to Amend and File the Further Proposed
12 Amended Complaints in the Knowledge Actions filed by David
13 Elsberg on behalf of Fairfield-Sentry Limited (In
14 Liquidation), Fairfield Sigma Limited (In Liquidation),
15 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
16 and Greig Mitchell, solely in their capacities as Foreign
17 Representatives and Liquidators thereof
18
19 HEARING re Adversary proceeding: 10-03633-cgm Fairfield
20 Sentry Limited (In Liquidation) et al v. HSBC Private Bank
21 (Suisse) SA et al
22 Doc# 135 Motion to Amend and File the Further Proposed
23 Amended Complaints in the Knowledge Actions filed by David
24 Elsberg on behalf of Fairfield Sentry Limited (In
25 Liquidation), Fairfield Sigma Limited (In Liquidation),

1 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
2 and Greig Mitchell, solely in their capacities as Foreign
3 Representatives and Liquidators thereof

4
5 HEARING re Adversary proceeding: 10-03634-cgm Fairfield
6 Sentry Limited (In Liquidation) et al v. Zurich Capital
7 Markets Company et al.

8 Doc# 297 Motion to Amend and File the Further Proposed
9 Amended Complaints in the Knowledge Actions filed by David
10 Elsberg on behalf of Fairfield Sentry Limited (In
11 Liquidation), Fairfield Sigma Limited (In Liquidation),
12 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
13 and Greig Mitchell, solely in their capacities as Foreign
14 Representatives and Liquidators thereof

15
16 HEARING re 10-03634-cgm Fairfield Sentry Limited (In
17 Liquidation) et al v. Zurich Capital Markets Company et al.
18 Doc# 304 Opposition Brief (Opposition to the Liquidators'
19 Motion for Leave to Amend the Complaint) (related
20 document(s)297) filed by Alan B. Vickery on behalf of Zurich
21 Capital Markets Company.

22
23 HEARING re Adversary proceeding: 10-03635-cgm Fairfield
24 Sentry limited (In Liquidation) et al v. Union Bancaire
25 Privee, UBP SA et al

1 Doc# 560 Motion to Amend and File the Further Proposed
2 Amended Complaints in the Knowledge Actions filed by David
3 Elsberg on behalf of Fairfield Sentry Limited (In
4 Liquidation), Fairfield Sigma Limited (In Liquidation),
5 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
6 and Greig Mitchell, solely in their capacities as Foreign
7 Representatives and Liquidators thereof

8
9 HEARING re Adversary proceeding: 10-03636-cgm Fairfield
10 Sentry Limited (In Liquidation) et al v. Union Bancaire
11 Privee, UBP SA et al

12 Doc# 618 Motion to Amend and File the Further Proposed
13 Amended Complaints in the Knowledge Actions filed by David
14 Elsberg on behalf of Fairfield Sentry Limited. (In
15 Liquidation), Fairfield Sigma Limited (In Liquidation),
16 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
17 and Greig Mitchell, solely in their capacities as Foreign
18 Representatives and Liquidators thereof

19
20 HEARING re Adversary proceeding: 10-03780-cgm Fairfield
21 Sentry Limited (In Liquidation) et al v. UBS AG New York et
22 al

23 Doc# 122 Motion to Amend and File the Further Proposed
24 Amended Complaints in the Knowledge Actions filed by David
25 Elsberg on behalf of Fairfield Sentry Limited (In

1 Liquidation), Fairfield Sigma Limited (In Liquidation),
2 Fairfield Lambda Limited (In Liquidation),. and Kenneth Krys
3 and Greig Mitchell, solely in their capacities as Foreign
4 Representatives and Liquidators thereof

5
6 HEARING re Adversary proceeding: 10-04098-cgm Fairfield
7 Sentry Limited (In Liquidation) et al v. BNP Paribas
8 Arbitrage SNC et al

9 Doc# 77 Motion to Amend and File the Further Proposed
10 Amended Complaints in the Knowledge Actions filed by David
11 Elsberg on behalf of Fairfield Sentry Limited (In
12 Liquidation), Fairfield Sigma Limited (In Liquidation),
13 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
14 and Greig Mitchell, solely in their capacities as Foreign
15 Representatives and Liquidators thereof

16
17 HEARING re Adversary proceeding: 10-04099-cgm Fairfield
18 Sentry Limited (In Liquidation) et al v. BNP Paribas Private
19 Bank and Trust Cayman Ltd. et al

20 Doc# 98 Motion to Amend and File the Further Proposed
21 Amended Complaints in the Knowledge Actions filed by David
22 Elsberg on behalf of Fairfield Sentry Limited (In
23 Liquidation), Fairfield Sigma Limited (In Liquidation),
24 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
25 and Greig Mitchell, solely in their capacities as Foreign

1 Representatives and Liquidators thereof

2

3 HEARING re 10-13164-cgm Fairfield SentryY. Limited and Nomura
4 International

5 Doc# 967 Notice of Adjournment of Hearing RE: Hearing on

6 Status Conference; hearing not held and adjourned to

7 7/28/2021 at 10:00 AM at Videoconference (ZoomGov) (CGM).

8

9 HEARING re Adversary proceeding: 11-01250-cgm Fairfield

10 Sentry Limited (In Liquidation) et al v. UBS Luxembourg SA

11 et al

12 Doc# 100 Motion to Amend and File the Further Proposed

13 Amended Complaints in the Knowledge Actions filed by David

14 Elsberg on behalf of Fairfield Sentry Limited (In

15 Liquidation), Fairfield Sigma Limited (In Liquidation),

16 Fairfield Lambda Limited _(In Liquidation), and Kenneth

17 Krys and Greig Mitchell, solely in their capacities -as

18 Foreign Representatives and Liquidators thereof

19

20 HEARING re Adversary proceeding: 11-01463-cgm Fairfield

21 Sigma Limited (In Liquidation) et al v. Merrill Lynch

22 International et al

23 Doc# 87 Motion to Amend and File the Further Proposed

24 Amended Complaints in the Knowledge Actions filed by David

25 Elsberg on behalf of Fairfield Sentry Limited (In

1 Liquidation), Fairfield Sigma Limited (In Liquidation),
2 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
3 and Greig Mitchell, solely in their capacities as Foreign
4 Representatives and Liquidators thereof

5
6 HEARING re Adversary proceeding: 11-01579-cgm Fairfield
7 Sentry Limited (In Liquidation) et al v. BNP Paribas
8 Securities Nominees Ltd. et al

9 Doc# 81 Motion to Amend and File the Further Proposed
10 Amended Complaints in the Knowledge Actions filed by David
11 Elsberg on behalf of Fairfield Sentry Limited (In
12 Liquidation), Fairfield Sigma Limited (In Liquidation),
13 Fairfield Lambda Limited (In Liquidation), and Kenneth Krys
14 and Greig Mitchell, solely in their capacities as Foreign
15 Representatives and Liquidators thereof

16
17 HEARING re Adversary proceeding: 11-01617-cgm Fairfield
18 Sentry Limited (In Liquidation) et al v. Fortis Bank SA/NV
19 et al

20 Doc# 73 Motion to Amend and File the Further Proposed
21 Amended Complaints in the Knowledge Actions filed by David
22 Elsberg on behalf of Fairfield Sentry Limited (In
23 Liquidation), Fairfield Sigma Limited (In Liquidation),
24 Fairfield .Lambda Limited (In Liquidation), and Kenneth Krys
25 and Greig Mitchell, solely in their capacities as Foreign

Representatives and Liquidators thereof

HEARING re Adversary proceeding: 11-02770-cgm Fairfield

Sentry Limited (In Liquidation) et al v. Citigroup Global
Markets Limited et al

Doc# 81 Motion to Amend and File the Further Proposed

Amended Complaints in the Knowledge Actions filed by David

Elsberg on behalf of Fairfield Sentry Limited (In

Liquidation), Fairfield Sigma .. Limited (In Liquidation),

Fairfield Lambda Limited (In Liquidation), and Kenneth Krys

and Greig Mitchell, solely in their capacities as Foreign

Representatives and Liquidators thereof

HEARING re Adversary proceeding: 12-01551-cgm Fairfield

Sentry Limited (In Liquidation) et al v. BNP Paribas Espana

f/k/a Fortis Bank (Espana) et al

Doc# 72 Motion to Amend and File the Further Proposed

Amended Complaints in the Knowledge Actions filed by David

Elsberg on behalf of Fairfield Sentry Limited (In

Liquidation), Fairfield Sigma Limited (In Liquidation),

Fairfield Lambda Limited (In. Liquidation), and Kenneth Krys

and Greig Mitchell, solely in their capacities as Foreign

Representatives and Liquidators thereof

Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 SELENDY GAY, PLLC

4 Attorneys for the Liquidators

5 1290 Avenue of the Americas, 17th Floor

6 New York, NY 10104

7

8 BY: DAVID ELSBERG (TELEPHONICALLY)

9 YELENA KONANOVA (TELEPHONICALLY)

10 ESTER MURDUKHAYEVA (TELEPHONICALLY)

11

12 BROWN RUDNICK LLP

13 Attorneys for Fairfield Sentry Limited

14 7 Times Square

15 New York, NY 10036

16

17 BY: DAVID MOLTON (TELEPHONICALLY)

18 MAREK P. KRZYZOWSKI (TELEPHONICALLY)

19

20

21

22

23

24

25

1 BOIES SCHILLER FLEXNER LLP

2 Attorneys for Zurich Capital Markets Company et al.

3 55 Hudson Yards

4 New York, NY 10001

5

6 BY: STEVEN FROOT (TELEPHONICALLY)

7 JENNA C. SMITH (TELEPHONICALLY)

8

9 CLEARY, GOTTlieb, STEEN, HAMILTON LLP

10 Attorneys for Citigroup Switzerland & Citibank

11 One Liberty Plaza

12 New York, NY 10006

13

14 BY: CARMINE BOCCUZZI (TELEPHONICALLY)

15

16 CLEARY GOTTlieb STEEN HAMILTON LLP

17 Attorneys for HSBC Bank USA

18 2112 Pennsylvania Avenue, NW, Suite 1000

19 Washington, DC 20037

20

21 BY: NOWELL BAMBERGER (TELEPHONICALLY)

22

23

24

25

1 O'Melveny Myers LLP

2 Attorneys for Merrill Lynch Bank Entities

3 7 Times Square

4 New York, NY 10036

5

6 BY: NATHANIEL ASHER (TELEPHONICALLY)

7

8 SHEARMAN STERLING LLP

9 Attorney for Bank Itau

10 599 Lexington Avenue

11 New York, NY 10022

12

13 BY: RANDY LEWIS MARTIN (TELEPHONICALLY)

14

15 SULLIVAN CROMWELL LLP

16 Attorneys for Standard Chartered Bank

17 125 Broad Street

18 New York, NY 10004

19

20 BY: ANDREW JOHN FINN (TELEPHONICALLY)

21

22 ALSO PRESENT TELEPHONICALLY:

23 RACHEL EHRLICH ALBANESE

24 JAMES BICKS

25 RICHARD CIRILLO

1 MARC R. COHEN
2 RAHMAN CONNELLY
3 JORDAN GARMAN
4 ANDREW G. GORDON
5 MARK G. HANCHET
6 GREGORY F. HAUSER
7 ANGELA K. HERRING
8 CHRISTINE MARIE JORDAN
9 THOMAS S. KESSLER
10 MARSHALL R. KING
11 RONALD KROCK
12 GREGORY F. LAUFER
13 BENJAMIN LOVELAND
14 DANIEL A. NEGLESS
15 KEITH R. PALFIN
16 JACHA D. PREUSS
17 DANIEL SHAMAH
18 FLETCHER W. STRONG
19 ELIZABETH VICENS
20 DAVID MORRIS
21 MICHAEL C. LAMBERT
22 DONG NI XU
23 DAVID FARRINGTON YATES
24 ERIC HALPER
25 RICHARD LEVIN

1 EVAN NOLLER BIANCHI
2 KIMBERLY BLACK
3 SAMUEL BREIDBART
4 MAXWELL DILLAN
5 CHERELLE GLIMP
6 KEVIN C. KELLY
7 BIANCA LIN
8 WILLIAM A. MAHER
9 MARK MAKER
10 GREIG MITCHELL
11 ALICE O'BRIEN
12 LEIF RAANES
13 MELANIE WESTOVER YANEZ
14 HARRISON POLANS
15 ERIN E. VALENTINE
16 KENNETH KRYS
17 JOHN VERAJA

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1 P R O C E E D I N G S

2 THE COURT: Now then we're at the 10:30 calendar,
3 and I need to go through this a little more carefully in a
4 sort of different way because we have a lot of things on,
5 and I need to set it up. So I'm -- now we're at 10-03622,
6 Fairfield Sentry Limited v. Citibank. That's the first
7 adversary I have on. State your name and affiliation.

8 MR. ELSBERG: This is David Elsberg, for the
9 liquidators, Ken Kryz and Greig Mitchell, who --

10 THE COURT: Mr. -- okay, Mr. Elsberg, let me stop
11 you there because I really just wanted your name. And then
12 I'm going to -- if you don't mind, I -- if you looked at the
13 calendar, we're going to follow the calendar.

14 So the first one I've called is 10-03629. And Mr.
15 Elsberg, you've put your name on the record. But I believe
16 this is an unopposed motion to amend. And is there anyone
17 on this particular case? I have heard no one. And since
18 this is an unopposed motion to amend, Mr. Elsberg, submit an
19 order.

20 MR. ELSBERG: Yes, Your Honor.

21 THE COURT: And then the next one I have is 10-
22 03626, Fairfield Sentry Limited v. BGL BNP Paribas, S.A., et
23 al. Mr. -- state your name for this case. Mr. Elsberg?

24 MR. ELSBERG: Yes. David Elsberg again for the
25 liquidators.

1 THE COURT: Is there anyone else on this, this
2 particular case? And I have an unopposed motion to amend.
3 Am I correct in that?

4 MR. ELSBERG: Yes, Your Honor.

5 THE COURT: Very good. I'm going to grant that
6 motion, and submit an order. I'm struggling a bit sometimes
7 with the consolidations. But we'll try to struggle through
8 it.

9 And then case number 10-03627, Krys v. PNB [sic]
10 Paribas Securities Services Luxembourg. State your name for
11 the record.

12 MR. ELSBERG: David Elsberg, for the liquidators.

13 THE COURT: And I -- is there anyone on this case?
14 And I have it as it's a motion to amend, and it is
15 unopposed. Is that correct?

16 MR. ELSBERG: Yes, Your Honor.

17 THE COURT: So there would be no one else on the
18 case. Again, submit an order.

19 MR. ELSBERG: Yes, Your Honor.

20 THE COURT: 10-03630, Fairfield Sentry Limited v.
21 HSBC Securities Services (Luxembourg) SA, et al., and I --
22 you have to tell me a bit about this one because I don't
23 seem to have that same note. State your name for the
24 record.

25 MR. ELSBERG: David Elsberg, for the liquidators,

1 Your Honor.

2 THE COURT: Is this unopposed?

3 MR. ELSBERG: Yes, Your Honor.

4 THE COURT: Very good. So if you will submit an
5 order on that.

6 MR. ELSBERG: Yes, Your Honor.

7 THE COURT: 10-03633, Fairfield Sentry Limited v.
8 HSBC Private Bank (Suisse) SA, et al. State your name for
9 the record.

10 MR. ELSBERG: David Elsberg, for the liquidators.

11 THE COURT: And I have that as it's a motion -- a
12 motion to amend, and it is unopposed.

13 MR. ELSBERG: Yes, Your Honor.

14 THE COURT: Very good. Submit an order.

15 MR. ELSBERG: Yes, Your Honor.

16 THE COURT: Now the next one I am going to hold,
17 and that is the Fairfield Sentry v. Zurich Capital, because
18 I believe we're going to hear argument on that one. But
19 then let's go to 10-03635, Fairfield Sentry Limited v. Union
20 Bancaire Privee, UBP SA, et al. State your name for the
21 record.

22 MR. ELSBERG: David Elsberg, for the liquidators.

23 THE COURT: And Mr. Elsberg, I have this as a
24 motion to amend, and it is unopposed.

25 MR. ELSBERG: Yes, Your Honor.

1 THE COURT: Very good. Submit an order. 10-
2 03636, Fairfield Sentry Limited v. Union Bancaire Privee,
3 BPA [sic] SA, et al. I have that as a motion to amend, and
4 it is unopposed.

5 MR. ELSBERG: Yes, Your Honor.

6 THE COURT: Submit -- yes, sir? Very good.
7 Submit an order. 10-03780, Fairfield Sentry v. UBS AG New
8 York, et al. I have that as a motion to amend, and I have
9 it as unopposed. But state your name for the record, Mr.
10 Elsberg.

11 MR. ELSBERG: David Elsberg, for the liquidators.
12 Yes, unopposed, Your Honor.

13 THE COURT: Very good. Submit an order. 10-
14 04098, Fairfield Sentry Limited v. BNP Paribas Arbitrage
15 SNC, et al. I also have that as a motion to amend and
16 unopposed. State your name.

17 MR. ELSBERG: David Elsberg, for the liquidators.
18 Unopposed, Your Honor.

19 THE COURT: Very good. Submit an order. 10-
20 04099, Fairfield Sentry v. BNP Paribas Private Bank and
21 Trust Cayman Ltd., et al. I have that as a motion to amend
22 and unopposed. State your name.

23 MR. ELSBERG: David Elsberg, for the liquidators.
24 Yes, unopposed.

25 THE COURT: Very good. Submit an order. 10-

1 03496, Fairfield Sentry -- okay. That's the lead case.

2 Wait, wait. No. It's not. Fairfield Sentry, et al. v.

3 Theodoor GGC Amsterdam, et al.

4 MR. ELSBERG: David Elsberg, for the liquidators,

5 Your Honor. And that is the lead case, Your Honor.

6 THE COURT: And that is what we have everything

7 docketed in, correct?

8 MR. ELSBERG: Yes, Your Honor.

9 THE COURT: Even though this case has been

10 dismissed, it's just a placeholder for all the remaining

11 cases?

12 MR. ELSBERG: Yes, Your Honor. That's correct.

13 THE COURT: Okay. All right. So then what is 10-

14 13164, Fairfield Sentry Limited -- oh, that's just the case.

15 Okay. I'll hold that because I'll want an update on what's

16 going on. So we'll just hold that until the end. But then

17 11-02 -- 11-01250, Fairfield Sentry v. UBS Luxembourg, et

18 al. I have that as a motion to amend and unopposed.

19 MR. ELSBERG: David Elsberg, for the liquidators.

20 Yes, Your Honor. Unopposed.

21 THE COURT: Submit an order. 11-01463, Fairfield

22 Sigma Limited v. Merrill Lynch International. I have that

23 as a motion to amend, and it is unopposed.

24 MR. ELSBERG: David Elsberg, for the liquidators.

25 Yes, Your Honor. Unopposed.

1 THE COURT: Very good. Submit an order. 11-
2 01579, Fairfield Sentry v. BNP Paribas Securities Nominee
3 Ltd., et al. I have that as a motion to amend, an unopposed
4 motion to amend.

5 MR. ELSBERG: David Elsberg, for the liquidators.
6 Yes, Your Honor. Unopposed.

7 THE COURT: Submit -- submit an order. 11-01617,
8 Fairfield Sentry v. Fortis Bank SA/NV. I have that as a
9 motion to amend, unopposed.

10 MR. ELSBERG: David Elsberg, for the liquidators.
11 Yes. That's correct, Your Honor.

12 THE COURT: Submit an order. 11-02770, Fairfield
13 Sentry v. Citigroup Global Markets Limited. I have that as
14 a motion to amend and unopposed.

15 MR. ELSBERG: David Elsberg, for the liquidators.
16 That's correct, Your Honor. Unopposed.

17 THE COURT: Submit an order.

18 MR. BOCCUZZI: Good morning. Good morning, Your
19 Honor. Excuse me?

20 THE COURT: Yes, sir? Yes, sir?

21 MR. BOCCUZZI: This is Carmine Boccuzzi, from
22 Cleary, Gottlieb. I represent Citigroup Global Markets
23 Limited, as well as other Citi defendants. Just for -- and
24 you're correct, Your Honor, and Mr. Elsberg's correct.
25 There wasn't an opposition from this defendant to the motion

1 to amend. I just -- for the sake of the record, the grounds
2 for moving to amend at this stage were based on bad faith or
3 undue prejudice or delay as opposed to futility.

4 THE COURT: Okay. Okay. But I still have an
5 unopposed motion to amend, correct?

6 MR. BOCCUZZI: Correct, based on those grounds.
7 Yes, Your Honor.

8 THE COURT: Okay. Submit an order, Mr. Elsberg.

9 MR. ELSBERG: Yes, Your Honor.

10 THE COURT: 12-01551, Fairfield Sentry v. BPN
11 [sic] Paribas Espana f/k/a Fortis Bank (Espana). I have
12 that as a motion to amend, and unopposed. Mr. Elsberg?

13 MR. ELSBERG: Yes, Your Honor. Correct.

14 THE COURT: State your --

15 MR. ELSBERG: David Elsberg, for the liquidators.
16 That's correct, Your Honor.

17 THE COURT: Very good. Submit an order. Now I
18 believe I've gone through everything except the one we are
19 here to hear today, and that is the --

20 MR. ELSBERG: 10-3634, Zurich Capital Markets,
21 Your Honor.

22 THE COURT: Exactly. And then the -- but just for
23 my -- I have the Mayer case which has been adjourned,
24 correct?

25 MR. ELSBERG: Yes, Your Honor.

1 THE COURT: Okay. Good. All right. I'm just
2 trying to make sure because when we started I had
3 everything, and I wanted to make sure I didn't miss
4 anything. So as far as we know right now, everything else
5 has been adjourned except the one we're now dealing with.

6 MR. ELSBERG: Yes, Your Honor.

7 THE COURT: Very good. And this is adversary 10-
8 03634, Fairfield Sentry, et al. v. Zurich Capital Markets,
9 Banco Itau Europa Luxembourg, Bank Morgan Stanley AG, Bank
10 Morgan Stanley SA, Banc Sudameris, Caprice International
11 Group, Citibank Switzerland Zurich, Citivic Nominees
12 Limited, Compagnie Bancaire Espiritu Santo SA n/k/a Banque
13 Privee Espiritu Santo, EFG Private Bank SA, Merrill Lynch
14 Bank, Morgan Stanley & Co. International plc, Safra National
15 Bank of New York, HSBC Bank USA, Antonio Bacelar Carrehas,
16 Desert Rose Limited, Edson Terra Cunha, Denise Bar, Fabio
17 Rodrigues Mendez, Pine Cliffs Investment Limited, ASBT
18 Cayman Sub No. 82, Beneficial Owners of Accounts Held in the
19 Name of Zurich Capital Markets 1-1000, EFG Bank AG f/k/a EFG
20 Private Bank SA, ZCM Asset Holdings Bermuda, ZCM Matched
21 Funding Corp., Citibank Switzerland AG and the remand
22 defendants, and I don't have those. They're checked against
23 the complaints.

24 Let's state your name and who you represent.

25 MR. ELSBERG: This is David Elsberg. I represent

1 the joint liquidators, Ken Krys and Greig Mitchell, who are
2 on the line with us today, and I'm also accompanied by my
3 colleagues from Selendy & Gay, Lena Konanova and Ester
4 Murdukhayeva, and I'm also joined by my colleagues from
5 Brown Rudnick, David Molton and Marek Krzyzowski.

6 THE COURT: Very good. And as defendants?

7 MR. FROOT: Your Honor, Steven Froot, Boies
8 Schiller Flexner, for Zurich Capital Markets Company, and I
9 am joined by my colleague from Boies Schiller Flexner, Jenna
10 Smith.

11 THE COURT: Very good.

12 MR. BOCCUZZI: Good morning, Your Honor. Carmine
13 Boccuzzi, from Cleary, Gottlieb, and I'm here on behalf of
14 Citibank Switzerland and Citibank.

15 MR. BAMBERGER: Good morning, Your Honor. Nowell
16 Bamberger, also of Cleary, Gottlieb, on behalf of HSBC Bank
17 USC in this adversary proceeding.

18 MR. ASHER: Good morning, Your Honor. Nate Asher,
19 on behalf of Merrill Lynch Bank, an entity that we've
20 maintained doesn't exist. But we represent Merrill Lynch
21 entities in these actions, and have at least tabled that
22 issue for now.

23 MR. MARTIN: Good morning, Your Honor. Randy
24 Martin, for Banco Itau Europa Luxembourg.

25 MR. FINN: Good morning, Your Honor. Andrew Finn,

1 from Sullivan and Cromwell, on behalf of Safra National Bank
2 of New York.

3 THE COURT: Okay. Before we move on, Mr. Asher,
4 you're representing a company that you say it doesn't exist?

5 MR. ASHER: That's right, Your Honor. We
6 represent the Merrill Lynch entities in these cases
7 generally and in this adversary proceeding, there is an
8 entity named Merrill Lynch Bank, and that's an entity that
9 we've maintained doesn't exist. And so, throughout this
10 litigation, to protect Merrill Lynch's interests, we've
11 preserved our argument that it doesn't exist. But we are
12 trying to -- we've agreed with the liquidators. We entered
13 into a stipulation recently tabling that issue for now.

14 THE COURT: Okay. Well, you're going to have to
15 explain to me at some point that you can represent something
16 that doesn't exist. I think there's an ethical issue right
17 here, and I think it's huge. And if you follow my record,
18 you'll understand that I treat ethical issues probably more
19 diligently than any other judge possibly in the nation.

20 MR. ASHER: Okay. Your Honor, if I may --

21 THE COURT: Why don't you just let a default enter
22 against a company that doesn't exist and quit wasting
23 everybody's time on it?

24 MR. ASHER: Well again, Your Honor, we have been
25 representing Merrill Lynch entities generally in this case,

1 and this is one in which there was a Merrill Lynch entity
2 that was named. And we have been in communication with the
3 liquidators about this, and I think that --

4 THE COURT: I don't care. You're in front of me,
5 and there -- and if you just even look at the amount of time
6 that we have just spent talking to you and multiply it by
7 the number of people on this call for an entity that you say
8 doesn't exist, that's just stalling in my opinion. Why are
9 we wasting time on a company that doesn't exist?

10 MR. ASHER: Well, Your Honor, we would certainly
11 ask that the entity be dismissed from the action. But I
12 think that, again, we --

13 THE COURT: No. We're going to go with a default.
14 Somebody that's representing Merrill Lynch Bank has to be
15 the one to ask for the case to be dismissed. They're not --
16 you're not representing them. You told them it doesn't
17 exist. Why aren't we just ending -- did you get a retainer
18 from that entity?

19 MR. ASHER: Well, we certainly -- I'll have to
20 look into that arrangement, Your Honor. But I don't -- I
21 would -- I'm confident that we do not have a retainer on
22 behalf of -- well, Your Honor, if I may, I understand your
23 position --

24 THE COURT: You are representing them.

25 MR. ASHER: We have appeared --

1 THE COURT: They are in default. You can be here
2 as somebody just watching. But they're in default, if they
3 don't have a representative at these conferences. We'll
4 deal with it at the end. But, Mr. Elsberg, remind me that
5 Merrill Lynch Bank is not represented, and they -- I will --
6 you can enter defaults against anybody that is considered a
7 "fake entity." But we're going to do it that way.

8 MR. ELSBERG: Yes, Your Honor.

9 MR. ASHER: Well, we --

10 THE COURT: All right. Moving along?

11 MR. BICKS: Your Honor, this is James Bicks. I'm
12 representing the Morgan Stanley defendants. I apologize.
13 My camera is not working.

14 THE COURT: Okay. I hope you're not sitting at
15 the beach, and then we'd all be jealous and you had -- you
16 turned it off on purpose.

17 MR. BICKS: Oh, if only that could be true.

18 THE COURT: Okay.

19 MR. BICKS: But it's not, alas.

20 THE COURT: Okay. Next? Who else? Very good.
21 Mr. Elsberg, this is your motion.

22 MR. ELSBERG: Thank you, Your Honor. Under the
23 very liberal Rule 15 standard, we're seeking leave to amend
24 complaints in 17 of the 18 actions that are pending before
25 you, Your Honor. And very quickly I'll get to the reasons

1 that our motion should be granted. But if you'll let me,
2 I'll spend only about 60 seconds refreshing ourselves on
3 where we are procedurally because I think a very small
4 amount of context might help orient all of us.

5 THE COURT: Thank you.

6 MR. ELSBERG: So, Your Honor, pursuant to your
7 direction at the April 21 conference, and as Mr. Boccuzzi
8 just mentioned a few minutes ago, the parties are addressing
9 on this current motion, which is docket 3737, only whether
10 the amendment has been proposed in bad faith or would cause
11 undue prejudice or was made after undue delay. And the
12 issue of whether the proposed amendments are futile or
13 sufficient to state a claim is beyond the scope of this
14 motion. It's been deferred to the forthcoming motions to
15 dismiss.

16 Now defendants in 16 of the 17 relevant actions do
17 not oppose liquidator's motion for leave. You went through
18 the index numbers at the beginning. And so that means that
19 approximately 70 out of about 90 defendants in the 17
20 actions do not oppose our motion. The one action where our
21 motion to amend has been opposed is captioned 10-ap-03634,
22 as Your Honor mentioned in the beginning. And within that
23 action, Your Honor, only two defendants filed opposition
24 papers, specifically Zurich Capital Markets Company, which
25 I'll refer to as ZCM, or Zurich, and the second party is a

1 transferee that received redemptions through ZCM, Citibank
2 Switzerland, which I'll refer to as Citi.

3 And Your Honor, Citi's opposition is joined in
4 part by ten transferee defendants in the same action. Those
5 ten transferees join only point one of Citi's brief, which
6 addresses prejudice. They do not join part two, point two,
7 which addresses bad faith. So with that background, Your
8 Honor, I will address why the oppositions are meritless and
9 should be rejected. And I'll start with undue prejudice
10 because that's the factor that most courts give the most
11 weight to.

12 So, Your Honor, ZCM and the 11 transferees argue
13 that they somehow have been prejudiced. But, Your Honor,
14 they do not come anywhere close, not even close to showing
15 any prejudice. And the reason, Your Honor, the reason that
16 they cannot show prejudice is because merits discovery has
17 not even begun here. ZCM doesn't cite any case where leave
18 to amend was denied on the grounds of prejudice where merits
19 discovery had not yet begun.

20 And, Your Honor, that makes a lot of sense. And
21 it makes a lot of sense because the prejudice inquiry
22 focuses very heavily on the stage of the litigation when the
23 amendment occurs. The focus is not on whether, in a vacuum,
24 some particular period of time has elapsed. Courts tend to
25 look at whether document discovery is well underway, whether

1 depositions have already occurred, whether summary judgment
2 has happened, whether it's on the eve of trial. And this is
3 not a situation where lots of documents have been produced.
4 None has been produced, and no depositions have taken place.

5 So we're not going to be calling witnesses back
6 who already testified. We're not going to have to ask
7 dozens of document reviewers to go back and review documents
8 that they already looked at to now see if there's something
9 relevant to the new allegations. And the total absence of
10 any prejudice at all, Your Honor, is very vividly reinforced
11 by the Huxtable declaration that Zurich submitted supposedly
12 in support of their prejudice argument.

13 The most striking thing about the Huxtable
14 declaration, Your Honor, is what he does not say. He does
15 not say that ZCM has lost access to a single relevant
16 document. He does not say that there would be any burden at
17 all to access all of the relevant documents. And the same
18 goes for witnesses, Your Honor. All Huxtable says is that
19 certain individuals no longer work at the entity -- the
20 specific ZCM entity that's named as a defendant here.

21 But the key is he says nothing whatsoever to the
22 effect that it would be difficult at all to contact or get
23 the cooperation of witnesses with relevant knowledge. So,
24 for example, Your Honor, Mr. Huxtable chose not to tell us
25 whether the relevant employees have cooperation clauses in

1 severance agreements. He chose not to tell us whether those
2 employees who are no longer employed by the specific Zurich
3 entity that is the defendant, he doesn't say whether they
4 left that entity but left to go to another entity in the
5 Zurich family, which would make it very easy to get their
6 cooperation.

7 And we know from Huxtable's description of his own
8 career path that between 2001 and the present, he's moved
9 around from one Zurich entity to another. And there's no
10 reason to believe that he's unique in that regard. So zero
11 prejudice, not even an attempt to show any prejudice. And
12 in any event, Your Honor, getting testimony from former
13 employees, as Your Honor knows, it happens as a matter of
14 course. It creates no prejudice.

15 So the Zurich defendants utterly fail to carry
16 their burden to show prejudice and the subsequent
17 transferees, their argument is derivative of Zurich's. and
18 so their argument on prejudice also fails for the same
19 reason.

20 Now, Your Honor, I'll move to bad faith. Again,
21 Your Honor, the defendants don't come close to carrying
22 their burden. It's not even a close call. So to
23 demonstrate bad faith, Your Honor, it is not enough to show
24 merely that the plaintiff delayed in seeking the amendment.
25 We cite the Primetime 24 case, which makes that crystal

1 clear. And to demonstrate bad faith, Your Honor, it is also
2 not enough to show that when the original complaint was
3 filed, the plaintiff knew of evidence that support the
4 allegations that get added later in an amended complaint.
5 And on page five of our brief, Your Honor, we cite the
6 Affiliated FM case and the Randolph Foundation case, which
7 are crystal clear on that point.

8 Instead, Your Honor, courts find bad faith where
9 the plaintiff withholds allegations with an ulterior motive
10 to gain an unfair advantage. And that principle is fatal to
11 defendants because they don't identify any ulterior motive
12 or unfair tactical benefit that the liquidators sought to
13 gain. And in fact, the liquidators didn't gain any unfair
14 advantage. All that happened is that when Judge Bernstein
15 set a new pleading standard in Fairfield II, the liquidators
16 moved to amend in response to that change in the standard.
17 It's that simple.

18 And, Your Honor, a couple of months ago the Second
19 Circuit addressed the same type of situation in *Bensch v.*
20 *Umar*. And we submitted a copy of *Bensch* to Your Honor in a
21 supplemental authority letter on July 13, which is docket
22 3794. What happened in *Bensch*, Your Honor, is the plaintiff
23 believed that a special pleading standard applicable in
24 admiralty cases applied to his complaint. And he believed
25 that admiralty standard applied instead of the more

1 stringent Iqbal standard. And in the original complaint,
2 the plaintiff made no effort to include facts that he knew
3 at the time. He knew the facts when he filed the original
4 complaint. But he didn't include those facts to satisfy the
5 more stringent Iqbal standard. And the defendant there
6 argued that the plaintiff acted in bad faith.

7 And what the defendant said is, number one, there
8 was existing precedent that should have alerted the
9 plaintiff that the Iqbal standard was going to apply and,
10 number two, the defendants argued that the plaintiff knew
11 but withheld the facts that he later sought to add as
12 allegations in the amendment. And the Second Circuit,
13 reversing the court below, held that the plaintiff did not
14 act in bad faith.

15 The Second Circuit said that the plaintiff was
16 defending a legal proposition. I'm quoting now: "The
17 plaintiff was defending a legal proposition about the proper
18 pleading standard that, while incorrect, was believed in
19 good faith by the plaintiff."

20 And likewise here, the liquidators had a good-
21 faith belief that Citco's bad faith, as the administrator
22 and agent for the directors of the fund, could taint all of
23 defendants' redemption payments. And in fact, Your Honor,
24 the liquidators to this day still have a good-faith belief
25 in the Citco theory. That Citco theory is up on appeal.

1 And that theory, the Citco theory, has been reinforced since
2 Judge Bernstein issued his decision because the Privy
3 Council issued a decision after Fairfield II. The decision
4 is called Weaving II.

5 And in that case, the Privy Council held that the
6 fraudulent determination of net asset values, NAVs, by a
7 fund's directors could not bind redeeming shareholders,
8 meaning that the bad faith of the directors taints all of
9 the transferees and you don't have to show individualized
10 knowledge as to each transferee. And, Your Honor, that is
11 the gist of the Citco theory that Judge Bernstein rejected.
12 So there is no bad faith here because the pleading standard
13 changed, and the Second Circuit has addressed that.

14 And I'll address one more point on bad faith.
15 Another argument that does not work for ZCM and Citi. What
16 they say, despite what the Second Circuit held in Bensch,
17 what they say is that there's bad faith, there has to be bad
18 faith, they say, because the liquidators supposedly knew
19 before Fairfield II that knowledge allegations could be
20 important, and they point to some statements that the
21 liquidators made in 2016 in a hearing where Migani was
22 discussed.

23 But, Your Honor, this idea that the liquidators
24 should have known before Fairfield II that individualized
25 knowledge is important, that argument completely misses the

1 point. It doesn't make any difference if the liquidators
2 knew that one way, one way to obtain a claw-back was to
3 plead individualized defendant knowledge.

4 What matters is that it was not until Fairfield II
5 that Judge Bernstein rejected the Citco theory and announced
6 for the first time that the only way to support the
7 constructive trust claim and get a claw-back was to plead
8 individualized knowledge against each defendant. And once
9 Fairfield II came out, the defendants started the process of
10 preparing the amended complaint. So again their argument
11 about bad faith just gets no traction at all.

12 And just to quickly address the cases that they
13 cite, I'll just pick two of the ones that they rely on more
14 prominently. Their cases actually illustrate why they're
15 wrong and why there is no bad faith there. So they cite the
16 State Trading case, and what happened in that case is the
17 plaintiff chose not to plead a foreign law claim, a claim
18 under foreign law. And the plaintiff had an ulterior motive
19 in not pleading the foreign law claim in the original
20 complaint.

21 Specifically, Your Honor, the plaintiff did not
22 want to get kicked out on a motion to dismiss based on forum
23 non conveniens or on a forum selection clause. And the
24 forum selection clause required disputes to be heard in
25 Norway. Later, after the plaintiff's state law claims under

1 Connecticut law were dismissed, then the plaintiff sought to
2 amend to add foreign law claims that it had withheld. And
3 in that situation, the court found that the decision in the
4 original complaint to withhold the foreign law claim was
5 done with an ulterior motive. It was tactical, made with
6 the improper intention to get past the original motion to
7 dismiss and before the court found that there was bad faith.

8 By contrast, Your Honor, here the defendants don't
9 even try to argue that the liquidators deliberately omitted
10 any allegations from earlier complaints in order to increase
11 the odds of getting past a motion to dismiss or to gain any
12 other unfair advantage.

13 And their General Electric case is very similar.
14 Very briefly, Your Honor, in that case what happened is the
15 plaintiff filed an original complaint. In that original
16 complaint, in a securities action, the plaintiff did not
17 make any allegations that the defendant had scienter, that
18 the defendant acted fraudulently.

19 In fact, in the original complaint and a
20 subsequent complaint and in at least one brief, the
21 plaintiff specifically disavowed any allegations of
22 scienter. It was actually written into the complaint. To be
23 clear, we are not alleging scienter because they wanted to
24 proceed without being saddled by the heightened pleading
25 standard.

1 The court there found bad faith because after the
2 strict liability securities law claims had been dismissed,
3 then the plaintiff said, "You know all those scienter claims
4 that I previously disavowed and I said I wasn't bringing
5 because I didn't want to get hit with the higher pleading
6 standard? Guess what. Now I want to assert them." And
7 again, there the court found bad faith because there was an
8 ulterior motive to try to get an advantage by getting past a
9 motion to dismiss by withholding allegations.

10 But again here the defendants don't even argue
11 that anything of the sort happened. The liquidators were
12 not sitting in their room, rubbing their hands, jockeying to
13 try to figure out if we withhold these allegations, maybe we
14 get past a motion to dismiss or get an unfair advantage. So
15 Your Honor, their arguments about bad faith also fail.

16 Now I'll address delay, Your Honor. So Your
17 Honor, there is no undue delay here. the liquidators did
18 not delay at all. To the contrary, as I mentioned earlier,
19 Your Honor, the liquidators promptly filed their motion to
20 amend after Judge Bernstein issued Fairfield II which
21 changed the pleading standard.

22 So what happened, Your Honor, is that Fairfield II
23 was decided by Judge Bernstein on December 6 of 2018. And
24 before that decision came out, the liquidators had pursued a
25 constructive trust theory that focused on Citco, which was

1 the fund's administrator and the agent of the fund's
2 director.

3 More specifically, before Fairfield II, Your
4 Honor, the liquidators pursued the theory that Citco's bad
5 faith in issuing inflated NAV statements could taint all of
6 the defendants' redemption payments, and this is the reason
7 why, Your Honor. The Citco theory is based on the plain
8 language of the fund's governing articles, which say that
9 any NAV certificates given in good faith. That's the key
10 language. Any NAV certificate given in good faith will be
11 binding on all parties.

12 So under the Citco theory, the liquidators were
13 pursuing Citco's bad faith because under the articles the
14 liquidators have argued and continue to argue on appeal the
15 bad faith under the fund's articles mean the liquidators
16 could recover on all defendants' redemption payments without
17 the need to prove individualized knowledge by each
18 defendants.

19 So the liquidators were pursuing that in good
20 faith. But then on December 6 of 2018, Judge Bernstein
21 decided Fairfield II, which is docket 17-43. And the world
22 changed for the liquidators with that decision because Judge
23 Bernstein announced for the first time, as I mentioned
24 earlier, that the liquidators could not pursue the Citco
25 theory. He held even if Citco acted in bad faith, doesn't

1 matter. That would not taint the transfer to the individual
2 defendants. As I mentioned, that was on appeal. Weaving
3 was issued after Judge Bernstein's Fairfield II. We still
4 have a good faith belief in it.

5 And in Fairfield II, Judge Bernstein also
6 announced for the first time that the only way that the
7 liquidators could bring a constructive trust claim, Your
8 Honor, was by pleading that specific defendants accepted
9 redemption payments when they, the specific defendant, knew
10 those payments were inflated.

11 And, Your Honor, once that standard was announced,
12 the liquidators went to work. They went to work efficiently
13 and expeditiously to do what needed to be done to satisfy
14 the newly articulated pleading standard. And there was a
15 lot of work to do, Your Honor.

16 So just to give some quick examples, the
17 liquidators had to negotiate with the defendants over 300
18 orders implementing Fairfield II. We also unfortunately, we
19 had to -- first we had to identify and then we had to hire a
20 new expert to get up to speed on foreign law because
21 tragically, only about three months after Judge Bernstein
22 issued Fairfield II, our expert on BVI law who had been on
23 the case for years, very deeply involved, he suddenly passed
24 away.

25 So we had to find a new foreign law expert and we

1 had to get that new foreign law expert up to speed which is
2 no easy task for anybody who comes to these dozens of
3 decades-old cases cold, as Your Honor may appreciate. And
4 it was essential. We had to do this. We couldn't avoid
5 getting the expert up to speed because the BVI knowledge
6 standard, which is at issue, that's what counts in these
7 cases, is different from U.S. law. And so we needed an
8 expert to consult with in order to prepare the amendments.

9 In addition to the 300 orders we had to prepare
10 and the expert we had to find and get up to speed, Your
11 Honor, we also had to conduct the due diligence that's
12 required under Rule 11(b) to make sure that the allegations
13 that we were going to make had factual support or were
14 likely to have factual support. And so the liquidators did
15 a lot of work, Your Honor.

16 So the liquidators, for example, reviewed
17 documents that were produced by Citco in a related
18 litigation. The liquidators reviewed complaints that were
19 listed in Madoff-related litigations. The liquidators went
20 onto Bloomberg terminals, did research for information that
21 was available, also looked at SEC filings. It was a very
22 comprehensive due diligence effort.

23 And on top of the due diligence, Your Honor, we
24 also had to engage in the intensive process of drafting and
25 filing 29 individualized proposed amended complaints, which

1 remember, their 29 complaints, which is a lot of complaints,
2 but those complaints are against more than 100 defendants.
3 So Your Honor, working expeditiously, we were able to
4 complete all of that work and get the amended complaints on
5 file within nine months of the issuance of the 300 orders
6 implementing Fairfield II.

7 So there was no undue delay. To the contrary,
8 Your Honor, there was a lot of work to be done and nine
9 months was the amount of time it took for the liquidators to
10 efficiently get that tremendous amount of work done.

11 And Your Honor, the Second Circuit and the
12 Southern District have allowed amendments where plaintiffs
13 waited much longer before amending. We cite multiple cases
14 on pages 17 to 19 of our opening brief where there were
15 delays of over a year, and in some cases four or five years.
16 So there is no undue delay here, Your Honor.

17 And I just want to mention a couple of what I see
18 as ancillary arguments. But I just want to quickly knock
19 them down. So ZCM argues that Judge Bernstein's August 2020
20 divestiture decision supposedly supports its argument for
21 delay. The divestiture decision is docket 3046.

22 But, Your Honor, the divestiture decision did not
23 even involve Rule 15's liberal standard for amendment.
24 Instead the ruling was based on Rule 60(b)'s excusable
25 neglect standard that applies when a party seeks relief from

1 a final judgment, which the case law has said is a "heavy
2 burden," very different from Rule 15.

3 And in that divestiture decision, Your Honor,
4 Judge Bernstein recognized that in some adversary
5 proceedings like this one that we're talking about right
6 now, the joint liquidators reserve the right to amend their
7 constructive trust claims. And having acknowledged that
8 reservation, Judge Bernstein gave no indication whatsoever
9 that seeking such an amendment under rule 15 would be
10 inappropriate.

11 Your Honor, they also argue that in the
12 divestiture decision, Judge Bernstein made comments
13 indicating that the liquidators were aware of the importance
14 of individualized knowledge allegations before Fairfield II.
15 And they say that in that decision, Judge Bernstein
16 recognized that by July 2016, Picard had pleaded individual
17 knowledge allegations and in November 2017, the Privy
18 Council issued the DD Growth case which held that
19 individualized knowledge allegations could support ac
20 constructive trust claim.

21 But again, Your Honor, this goes back to the same
22 point that I mentioned earlier. That type of argument
23 misses the point. It doesn't make any difference if there
24 were indications before Fairfield II that individualized
25 knowledge allegations could support a constructive trust

1 claim. It makes no difference that that was one available
2 route.

3 What matters is that neither the Picard
4 allegations nor DD Growth mentioned or foreclosed the
5 liquidator's Citco theory for pleading a constructive trust
6 claim based on Citco's bad faith and issuing the NAVs. So
7 both before and after the Picard pleadings and DD Growth,
8 the liquidators had every reason to continue to believe in
9 good faith that they could prevail on the Citco theory.

10 And one -- just one practical point on this, Your
11 Honor. DD Growth was decided in November of 2017. That was
12 when Judge Bernstein was right in the middle of deciding the
13 motion to dismiss that would be resolved by Fairfield II.
14 The defendants give no explanation for why it would have
15 made any sense for the liquidators should have sought to
16 amend during the pendency of a fully briefed motion to
17 dismiss.

18 So Your Honor, it wasn't until Fairfield II which
19 Judge Bernstein was in the middle of writing that Judge
20 Bernstein held that the only way the constructive trust
21 claim could be pled was by pleading individual knowledge.
22 So Your Honor, there was no delay. The defendants, they
23 like to say the relevant timeframe is ten years. They're
24 wrong about that. The clock starts running from the point
25 in time when Fairfield II was decided because that was the

1 moment when the pleading standard was established that told
2 the liquidators the only way to plead it is through
3 individualized knowledge allegations.

4 And one last point on delay, Your Honor, before I
5 will stop talking about delay, I'll just remind Your Honor
6 that even if the liquidators had delayed, delay alone is not
7 a reason to deny a motion for leave to amend. Any delay
8 must also be prejudicial. And as I demonstrated earlier,
9 there is zero prejudice here. No discovery has even started
10 except -- except, I should put a small qualification, we've
11 had a very limited amount of discovery on service, as Your
12 Honor knows. But that was very limited and it has nothing
13 to do with the merits. So there is no prejudice.

14 And with that, Your Honor, I will -- I will sit
15 down unless Your Honor has any questions.

16 THE COURT: I do not. Defendants?

17 MR. FROOT: Thank you, Your Honor. Again, Steven
18 Froot, Boies Schiller Flexner, representing Zurich Capital
19 Markets Company in opposition to the motion to amend,
20 specifically to add paragraphs five, nine to 13, 70 to 74
21 and 247 to 250 in the proposed amended complaint in
22 adversary proceeding 10-03634.

23 The liquidators argue that delay alone does not
24 require denial of leave to amend. But what they don't say
25 is that the burden is on the liquidators to justify the

1 delay. And it won't surprise the Court to hear that I don't
2 agree with almost anything that Mr. Elsborg has just said,
3 though he said it extremely eloquently.

4 The delay in this case has been inordinate. We
5 are not aware of any case, and none has been cited in either
6 side's papers, that amendment was allowed ten years after
7 commencement of the case, much less where the events alleged
8 for the first time last year occurred 18 years ago in 2003.

9 The new allegations that liquidators seek to
10 include in what would be their fifth complaint in this case
11 concern a failed asset sale --

12 THE COURT: I just want to interrupt you for one
13 moment because I want some clarification. I have that Judge
14 Lifland actually basically stayed this litigation until
15 further order of the court, right? In 2011, pending further
16 order of this court due to litigation that was ongoing in
17 the British Islands, while the court lifted the stay to
18 allow the liquidators to amend the claims in the Redeemer
19 Actions, it also held that defendants need not answer such
20 amended complaints until further order of this court.

21 So I hear what you're saying. But wasn't all of
22 this stayed for -- until about 2012?

23 MR. BOCCUZZI: 2016.

24 MR. FROOT: I believe that the stay, Your Honor,
25 was from 2011 until early 2016.

1 THE COURT: Okay. Okay.

2 MR. FROOT: And that stay resulted -- in terms of
3 the reasons for the stay, I think it's important, two points
4 on that, Your Honor. One --

5 THE COURT: As far as I'm concerned though, it's
6 still stayed at this moment because I don't think there's an
7 order of a court lifting it because Lifland said until
8 further order of this court.

9 MR. FROOT: I'm sure Mr. --

10 THE COURT: And I don't know that there's an order
11 of this court, and I haven't found it. Is there? Mr.
12 Froot, is there an order of this court lifting that stay?

13 MR. FROOT: My understanding is that there was an
14 order of the court lifting the stay in 2016.

15 THE COURT: I think Judge Bernstein only did a
16 partial lifting. I don't believe -- I have no been able to
17 find an order lifting the stay. That stay of -- not lifting
18 the stay as to -- but lifting the stay as to litigation that
19 Judge Lifland entered -- that Judge Lifland entered.

20 MR. FROOT: Yeah. All I know, Your Honor, is that
21 in liquidator's papers, in their reply memorandum and their
22 opening memorandum, they indicate that the stay was lifted
23 in 2016. I was not part of the case at that time. I will
24 defer to Mr. Boccuzzi or Mr. Bamberger as to the actual
25 event. But the stay was lifted, and the case has been

1 actively litigated since 2016. I would also -- and I think
2 Mr. --

3 THE COURT: Let me just let Mr. Elsberg clear this
4 for me. I don't believe it has been because we have really
5 checked the docket. Mr. Elsberg?

6 MR. ELSBERG: Yes. Your Honor is correct that the
7 litigation of this case has been stayed. We had started
8 asking Judge Bernstein before he left the bench to let some
9 discovery go forward.

10 I believe on the first time that we were in front
11 of Your Honor, I was saying we believe all discovery should
12 go forward. The defendants have not wanted discovery to go
13 forward. So we've been stuck at the pleadings stage after
14 the stay. And we were only permitted to seek to amend in
15 2016. And then Judge Bernstein's decision was issued in
16 2018.

17 MR. BAMBERGER: Your -- Your Honor?

18 THE COURT: So Mr. Froot -- yes? Yes, Mr.
19 Bamberger?

20 MR. BAMBERGER: Your Honor, can I just clarify a
21 point?

22 THE COURT: Sure.

23 MR. BAMBERGER: So the stay, as I understand it,
24 was lifted at a status conference by the judge on July 27,
25 2016.

1 THE COURT: I don't have an order.

2 MR. BAMBERGER: I don't know -- there was a
3 scheduling order that was issued at that point. The stay
4 was lifted for purposes of briefing motions. And then there
5 was a -- there have subsequently been, you know, two years
6 or so of briefing, or four years now, of briefing on motions
7 to dismiss. There is a stay of discovery. Mr. Elsberg is
8 right about that, and that stay of discovery, with the
9 exception of --

10 THE COURT: Exactly. And if you read that --

11 MR. BAMBERGER: But Your Honor --

12 THE COURT: If you read that transcript, it says
13 for the purposes of briefing the motion to dismiss. It
14 doesn't say beyond that. I'm trying to be critical --

15 MR. BAMBERGER: There is a -- there is a stay of
16 discovery that remains in place, Your Honor. That's --

17 THE COURT: So we can't say this has been going on
18 for ten years because it has absolutely been stayed except
19 for those briefing on the motion to dismiss, if I've read it
20 correctly, and that stay is still in place.

21 MR. ELSBERG: Your Honor, this is David Elsberg.
22 I'll just give you the docket number, if that's helpful.
23 It's docket 906, July 27, 2016.

24 THE COURT: That's the one where he lifted the
25 stay for briefing on the motion to dismiss. And that's from

1 the transcript.

2 MR. ELSBERG: That's absolutely right, Your Honor.
3 And that's all -- and that's all the lift was for

4 THE COURT: Exactly. So Mr. Froot, that's why
5 when you said it's been going on, I don't think it's been
6 going on.

7 MR. FROOT: Well, Your Honor, for purposes of
8 pleading, for purposes of all pleading, amendments, and for
9 purposes of investigation of claims, the case has absolutely
10 been going on for ten years. There was no stay of
11 investigation of the facts surrounding the claims during
12 that period of the stay. Your --

13 THE COURT: That's not -- that's not what the
14 record says.

15 MR. FROOT: The record says that motion practice n
16 pleadings can proceed. this is after January -- July 2016,
17 and that's exactly what's happened in the case. There has
18 been --

19 THE COURT: That's not ten years. July '16 is not
20 -- okay. Go ahead with your argument. We're hearing it
21 now. We're on it right now.

22 MR. FROOT: Thank you. The new allegations that
23 liquidators seek to include in what would be their fifth
24 complaint concern a failed asset sale in 2003 between Zurich
25 and Societe Generale. The facts alleged in the new

1 paragraphs in the complaint were matters of public record in
2 2008, two years before this action was commenced. The
3 liquidators have had multiple opportunities over the last
4 ten years, including before the stay was entered and after
5 the stay was entered, to amend to include new allegations.
6 But they adopted a wait-and-see approach.

7 As I said a moment ago, there was no stay of their
8 obligation to investigate their claims, even during the
9 period when the case was stayed for most purposes.

10 Courts will refuse to grant leave to amend where
11 the delay is inordinate and there is either prejudice to the
12 defendant or bad faith on the part of the plaintiff and both
13 prejudice and bad faith are present in this case.

14 I would also add that there are few, if any cases
15 that either side has uncovered in which the delay exceeds
16 five years or six years. So even if we were not talking
17 about a 10- or 11-year period, the delay in this case is
18 unquestionably inordinate.

19 Zurich has made an ample showing that the factors
20 the Supreme Court has laid out, four factors besides
21 futility which is not part of this motion, by Your Honor's
22 specification, undue delay, repeated failure to correct
23 pleadings through multiple amendments, and there have been I
24 guess five amendments of the complaint in this action --
25 four amendments, rather -- bad faith by the liquidators and

1 prejudice dessert. All of these together demonstrate and
2 support the Court's discretionary decision to deny leave to
3 amend.

4 Let me address bad faith, dilatory conduct by the
5 liquidators first. And I should add that the longer the
6 period of delay, and this is in the Evans case cited in our
7 papers, the longer the period of delay, the less prejudice a
8 party must show.

9 The liquidators have repeatedly failed to correct
10 their pleadings to allege actual knowledge on Zurich's part
11 even though they filed the initial complaint in 2010. They
12 amended in 2011. They also submitted an amended complaint -
13 - filed an amended complaint while the stay was in place in
14 2012 and they submitted, in addition, in 2012, a corrected
15 second amended complaint. So they were amending the
16 complaint, adjusting the pleadings in this case while the
17 stay was -- the stay of discovery and the stay of other
18 matters was in place.

19 They filed a third amended complaint in September
20 of 2016, and there was motion practice about whether to
21 allow that complaint. And that is the operative complaint
22 in this case that was filed in January of 2020, four years
23 later. That is the operative complaint. The operative
24 complaint in this case, filed in January of 2020, contains
25 absolutely no allegations of actual knowledge by Zurich.

1 The liquidators have demonstrated bad faith by
2 waiting to amend their complaint until over a year after
3 Judge Bernstein's decision in Fairfield II, even though, as
4 we explained in our papers, they were aware that they could
5 succeed on a constructive trust claim which has been in
6 every complaint against Zurich in this case by pleading and
7 providing actual knowledge against redeemer defendants like
8 Zurich. They always knew that. They had included
9 allegations of individual knowledge against other defendants
10 like Citibank as far back as 2012 and 2013. So there was
11 nothing preventing them from doing it, and indeed they did
12 do it in cases where they chose to.

13 The conference that Your Honor has focused on or
14 has read in July of 2016, the liquidators made very clear
15 that they were aware that problems they'd encountered in
16 rulings from the British Virgin Islands courts such as the
17 Migani decision in 2014 could be completely avoided if they
18 established liability or pleaded individual knowledge on the
19 part of redeemer defendants.

20 And at page 48 of that transcript that Mr. Elsborg
21 just mentioned and cited to, Judge Bernstein commented on
22 the difficulty of getting evidence of individual actual
23 knowledge as time goes by and directed liquidators to amend
24 their complaint. That wasn't all of it. In October of
25 2016, the liquidators filed a brief in support of that

1 amended complaint they filed in September of 2016, and they
2 recognized in that briefing that actual knowledge be
3 redeemer defendants are a separate basis for liability from
4 any focus on whether the NAV certificates were issued in
5 good faith.

6 Subsequently, in January, between January and June
7 of 2017, in briefing with the Citi defendants in this very
8 adversary proceeding, the Citi defendants repeatedly called
9 attention to the fact that there were no allegations of
10 actual knowledge against Zurich. The liquidators absolutely
11 made no answer to that, and those -- that briefing is at
12 docket 118 at page nine, docket 147 at page nine and docket
13 168 at page ten, all in this proceeding.

14 Judge Bernstein agreed with this assessment, and
15 now I will address the August 2020 decision, which indeed we
16 point out was a Rule 60(b) decision having to do with a
17 standard for whether to vacate a judgment, to reopen a
18 judgment.

19 That is true. But in reaching his decision, Judge
20 Bernstein detailed decisions by the BVI courts in 2014 and
21 2017 that held that a constructive trust claim would only
22 lie against a redeeming defendant like Zurich who had
23 knowledge that the NAV was inflated or the result of
24 wrongdoing by fraud. So the liquidators have had every
25 incentive for over five years to include actual knowledge

1 allegations. And the citation, the Westlaw citation is 2020
2 Westlaw 4813565, at star pages 9 to 12 for the appropriate
3 portion of Judge Bernstein's decision.

4 Now one of the points that Mr. Elsberg makes today
5 and makes in their reply -- in his reply brief at pages
6 seven to eight is that the liquidators explain that there
7 was this inordinate delay. They explain that they were
8 refrained from alleging actual knowledge on the part of the
9 redeemer defendants because they believed that it would be
10 sufficient for their purposes if they simply alleged that
11 they could impute bad faith on the part of Citco, the agent,
12 to all redeeming defendants.

13 But the important thing here under the case is
14 that this was a strategic choice. They had full knowledge
15 that if they asserted individual knowledge, they would
16 survive a pleading challenge or they could on that as is.
17 But they made a strategic choice only to allege one theory
18 of liability. They had both theories available to them, and
19 they waited six years to put those theories in the case in
20 January of 2020.

21 And the courts have been clear, including the
22 Second Circuit, that pleading seriatim, over many years and
23 awaiting rulings on successive motions to dismiss is not
24 acceptable and will constitute bad faith warranting denial
25 of leave to amend.

1 And to be clear, this is not a situation where a
2 legal standard changed. This is not a situation as in
3 Bensch where there was a good-faith belief in a legal
4 standard that was overturned by the appropriate court. That
5 did not happen in this case. There was a theory and for the
6 first time in this set of cases, Judge Bernstein reached, in
7 a typical motion to dismiss, he reached one of the claims in
8 2018 and said this claim won't wash, and he dismissed it.

9 But that is very different than saying that a
10 legal standard changed. Courts make ruling on motions to
11 dismiss all the time, and before a motion to dismiss is
12 filed in a case and before there's a ruling, you don't have
13 a ruling in that case, it doesn't mean that the legal
14 standard has shifted under people's feet.

15 So the liquidators made the strategic choice to
16 refrain from pleading actual knowledge, which they
17 understood would work and state a claim for constructive
18 trust on its face but which would require individualized
19 allegations against each redeemer defendant. They
20 determined to rely exclusively on pleading an imputation of
21 Citco's bad faith, which they could do on an omnibus basis.
22 It was easier. It was cheaper. It required less work.

23 But that's not -- that's not a basis. That's
24 strategic choice. It's not a basis to avoid bad faith nor
25 is it something that justifies causing prejudice to Zurich.

1 The liquidators had knowledge of this from public reports of
2 the SocGen transaction failing and SocGen having done an
3 investigation back in 2008. They had the information. They
4 knew the information was a way to allege individual
5 knowledge. They didn't use it. They chose not to use it.
6 And they could have used it, and they did use factual
7 knowledge alleged against other defendants as far back as
8 eight years ago in these cases.

9 In other words, even if the liquidators did not
10 know until Judge Bernstein's ruling that one of their
11 alternative theories would be rejected, they certainly could
12 have included allegations of actual knowledge in support of
13 their constructive trust claim against Zurich as early as
14 their initial complaint in this case, certainly by 2011,
15 before there was any stay.

16 Instead the liquidators sat on their hands. They
17 adopted a wait-and-see approach. And they did not include
18 in prior amended complaints any information about SocGen's
19 due diligence. And I refer Your Honor to those three widely
20 disseminated news reports that are exhibit B to Jenna
21 Smith's declaration that we've submitted in this case
22 regarding SocGen's due diligence.

23 And the result of this is that the allegations of
24 actual knowledge against Zurich were not included in any
25 proposed amended complaints until January of 2020, even

1 though the facts alleged were available in 2008 and could
2 have been included.

3 And if one accepts the liquidator's explanation
4 that they were not sure what they needed to argue and what
5 theory to pick amongst different theories until Judge
6 Bernstein's ruling about Citco in 2018, why are they
7 alleging -- why are they amending now? They can wait for
8 the appeal to be determined since they've appealed this
9 issue. There's no logical stopping point.

10 And I would point out, Your Honor, in addition,
11 with respect to bad faith, there are a number of cases in
12 this circuit, both at the circuit level, Second Circuit
13 level and in the district court level as well as bankruptcy
14 court that are very clear that seriatim pleading is a basis
15 for finding bad faith.

16 I commend to Your Honor the Vine case, which is
17 374 F.2d 627, at page 637, where the court said in waiting
18 to see how he would fair on the prior motion to dismiss
19 before seeking to amend the complaint, the plaintiff was
20 guilty of bad faith.

21 The Southern District of New York decision in Bank
22 v. Spark Energy, which is reported at 2020 Westlaw 6873436,
23 which is a November 23, 2020 decision, at pages star two to
24 star four, that was a case in which the plaintiff knew of
25 and easily could have asserted in the original complaint the

1 newly asserted facts but withheld them because he thought
2 they did not need to be alleged under notice pleading,
3 waited until the court had decided the motion to dismiss.

4 And the court commented, "Whatever tactical reason
5 the plaintiff may have had for knowingly omitting essential
6 facts in this case, the circumstances here justify a finding
7 of bad faith and a denial of leave to amend." In that case
8 and the Vine case, there had been no discovery, no merits
9 discovery taken at that point.

10 Another case from the Southern District of New
11 York, Lewis Family Group Fund, that's 2018 Westlaw 3579844,
12 SDNY July 25, 2018, interpreting the Second Circuit's
13 standards as holding that the "'wait-and-see approach' is
14 what the Second Circuit recognizes as a sign of bad faith
15 and a basis for denial of leave to amend."

16 The State Trading v. India case, that is -- that
17 was cited at argument today by Mr. Elsborg similarly holds
18 that the plaintiffs deliberately withheld a theory of
19 liability in that case. Now it happens that there was a
20 nefarious motive in that case. But the court did not find
21 and did not hold that that nefarious motive was a
22 requirement. Indeed the cases do not say that a plaintiff
23 must have a nefarious ulterior motive. If it sufficient
24 that the plaintiff stay back, hang back, wait until a motion
25 to dismiss is decided and then adjust its theories

1 accordingly after that. And that is not permitted in this
2 circuit.

3 And the General Electric case also that Mr.
4 Elbserg pointed out, I would quote. This is at 2012 Westlaw
5 2892376, SDNY July 12, 2012: "A court may make a finding of
6 bad faith for Rule 15(a) purposes when a party waited to see
7 how he would fair on a prior motion to dismiss," before,
8 "altering substantially its legal theory."

9 The court criticized this as a tactical decision
10 and criticized the presentation of theories seriatim. In
11 that case, the court found the plaintiff had ample notice of
12 the deficiency of its claim prior to briefing the motion to
13 dismiss. And on the prejudice point --

14 THE COURT: Mr. Froot, let me just interrupt you.
15 Are you reading from your brief?

16 MR. FROOT: No, Your Honor. I'm not. That was
17 just a case summary that I jotted down before the argument.

18 THE COURT: Okay.

19 MR. FROOT: Apologies. I'm done. I just wanted
20 to make it clear to the Court that there was ample case law
21 that supported this calculation of the Second Circuit's
22 standard.

23 THE COURT: Okay.

24 MR. FROOT: Let me address prejudice now for a
25 moment. Zurich will be severely prejudiced by the

1 liquidator's delay in waiting until the fourth amended
2 complaint over ten years into this case, which is actually
3 the fifth amended complaint, to include allegations of
4 actual knowledge of events going back to 2003. Sorry?

5 THE COURT: That wasn't me.

6 MR. FROOT: Apologies, Your Honor. Even though
7 the case is not in merits discovery, Zurich will find it
8 extremely difficult, it not impossible, to defend against
9 allegations made on information and belief without
10 attribution to any source or any stated basis that Societe
11 Generale communicated to someone, an unknown person at
12 Zurich, the findings of its due diligence into Madoff and if
13 Zurich in addition also pleaded on information and belief
14 recklessly disregarded that information.

15 Zurich would have to prove a negative. Zurich
16 doesn't know which official, which employee presumably or
17 purportedly received any information about this, and there's
18 no evidence that they have. the Zurich business that was
19 the redeeming entity went into runoff in 2003 because the
20 business was actually sold to BNP Paribas in the same year,
21 in July 2003. Most of the key employees left after that.

22 The surviving entity, and this is in Mr.
23 Huxtable's declaration, the surviving entity, which was
24 named Zurich Bank, continued traditional banking activities
25 but even itself went into runoff in 2010 and its banking

1 license was revoked in 2012. All the directors who were
2 present in 2003, the events that are alleged in the amended
3 complaint or sought to be alleged, had left by 2012, and
4 they are not working anywhere in the company at this time,
5 anywhere in the Zurich family of companies.

6 Before the end of 2016, the last employee who
7 worked at Zurich Capital Markets Company back in 2003 was
8 gone. And in the In re Teligent decision in this court,
9 Judge Bernstein recognized the difficulty in locating or, in
10 this case, even identifying former officers and directors to
11 ask about a particular even over ten years old. But here we
12 have a particular event almost 20 years old.

13 The new allegations of knowledge on Zurich's part
14 are also notwithstanding some sly references in opposing
15 counsel's brief a complete surprise to Zurich. There is no
16 indication in the report in 2008 about SocGen's due
17 diligence that Societe Generale ever informed Zurich about
18 its conclusions regarding Madoff in 2003.

19 Indeed the liquidators concede that the allegation
20 that SocGen informed Zurich is now alleged only on
21 information and belief. And I would also emphasize that the
22 longer the delay in the case, the less needs to be
23 demonstrated in terms of prejudice. And there are no
24 documents of which we are aware that would indicate which
25 employee had any particular role.

1 These documents were generated in 2003. The
2 company went into runoff in that year. And this complaint,
3 the complaints in this case were not even filed until 2010.
4 So there were no document preservation orders. I'm not
5 saying the documents aren't there, whatever documents there
6 are. But the business ended seven years before the
7 complaint was filed in this case.

8 I would also say that the standard for prejudice
9 is not quite so simple as holding up existing discovery.

10 THE COURT: I believe you're holding -- I think
11 you're arguing your prejudice point with facts that aren't -
12 - we don't have -- we haven't had discovery yet I think.
13 But that's okay. But I don't know that we've had discovery.

14 MR. FROOT: Well, these are simply, in a sense,
15 jurisdictional facts that the company went into runoff and
16 will not have access because that's the way that -- that's
17 the only way to show prejudice. No employees are left and
18 it's 18 years old. Some of that is just public record like
19 the news reports and the pleading that we're faced with.

20 I would just mention that the Block case, I'll
21 just mention cases. I can provide the cites later, Your
22 Honor. Block v. First Blood Associates, one of the factors
23 for prejudice is would it require the opponent to expend
24 significant additional resources to conduct discovery and
25 prepare for trial. And we think we've shown that given the

1 age and the nature of the allegations.

2 In Evans v. Syracuse City School District, Second
3 Circuit also, as was Block v. First Blood, "The longer the
4 period of unexplained delay, the less will be required of
5 the nonmoving party in terms of a showing of prejudice."

6 In JPMorgan Chase v. IDW Group, SDNY in 2009, the
7 broader inquiry into prejudice is the question what is the
8 proposed amendment's "practical impact on the other side's
9 legitimate interests including both that party's ability to
10 respond to new claims or defenses and any other prejudice
11 flowing from the delay in the final adjudication of the
12 case."

13 We've mentioned the In re Teligent case earlier.
14 The focus of these prejudice cases, Your Honor, is whether
15 there is a new theory that requires discovery and proof of
16 different facts. Is there a surprise? This case was
17 litigated up until January of 2020 without any regard to
18 individual knowledge by the redeeming defendant Zurich. Ten
19 years later, it is a complete about-face on the nature of
20 the claim, the theory and the facts at issue.

21 Two final cases. Ansam Associates v. Cola
22 Petroleum, Second Circuit, 1985. Again the key for the
23 Court there is that there was an entirely new set of
24 operative facts which it cannot be said that the original
25 complaint provided fair notice.

1 And finally, the Dueling case from the Southern
2 District of New York in 2010, prejudice is established where
3 the party opposing amendment would face "some unique
4 difficulty in defending against the new issues." And that
5 is all I seek to highlight for the Court in terms of the
6 prejudice.

7 The decision that was submitted after the close of
8 briefing, the new authority from the Second Circuit, I would
9 only point out that this is not a case, and I did aver to
10 this earlier, this is not a case in which there was a change
11 in the legal standard.

12 The liquidators had access to the information
13 since the litigation started. The liquidators included
14 allegations of actual knowledge against other defendants in
15 as early as 2012, other redeeming defendants. The
16 liquidators understood for over six years that the actual
17 knowledge was one way to establish liability on the part of
18 redeeming defendants. They chose not to put that theory int
19 heir complaints.

20 And the liquidators did not adopt a principled
21 position like the plaintiff in the face of established
22 Second Circuit authority that then changed. They didn't
23 reasonably rely on unsettled pleading standards. They
24 simply made a motion under a theory that was rejected by the
25 judge in this case. That happens every day and the courts

1 do not approve seriatim pleading.

2 And Bensch involved a period of over -- that's the
3 new case -- involved a period of over -- a little over 12
4 months from the filing of the complaint until they sought
5 relief to file a second amended complaint. In this case,
6 we're dealing with anywhere from five to ten years and facts
7 18 years old.

8 So I would just leave Your Honor with the thought
9 that there are a multitude of interrelated factors,
10 prejudice and bad faith present in this case when combined
11 with an inordinate delay virtually unprecedented in the case
12 law that warrant denial of leave to amend in this one case
13 among I believe Mr. Elsborg said there are 17 cases.

14 I think it may be noteworthy that Zurich is the
15 only defendant to object to amendment. And the reason for
16 that is that the circumstances are extraordinary and
17 extenuating in this case. And that is why Zurich has come
18 forward at this time as the only defendant to oppose, as a
19 lead defendant, the new allegations of fact brought against
20 it. Thank you, Your Honor.

21 THE COURT: Very good.

22 MR. BOCCUZZI: Good afternoon, Your Honor.
23 Carmine Boccuzzi, from Cleary, Gottlieb, for Citibank
24 Switzerland. I'd like to just speak briefly about the
25 situation of Citibank Switzerland vis-à-vis this action and

1 this pleading. As the court recognized in the divestiture
2 decision, 2020 Westlaw 4813565, the liquidators have known
3 about the importance of knowledge on the part of defendants
4 from at least 2016.

5 But in this case itself, in the 2012 second
6 amended complaint which is docket 62, which the liquidators
7 were allowed to file pursuant to an order allowing them to
8 put on and then file amended complaints, they had actually
9 purported to allege knowledge against Citigroup. I n
10 paragraphs 65 to 71 under a heading that Citigroup knew and
11 should have known of the BLMIS fraud, they purported to
12 plead knowledge against Citigroup, not against Citibank
13 Switzerland.

14 In 2016, when again the court allowed amendments,
15 Citigroup at that point had been dropped from the case.
16 Those allegations were removed and there were no knowledge
17 allegations put forward against Citibank Switzerland.

18 What happened then is following the Fairfield II
19 decision, now in the classic example that you find in the
20 Vine case or the Bank case, which we cite and Mr. Froot
21 mentioned, they're trying to seriatim, now call Citibank
22 Switzerland a knowledge defendant. And when the court --
23 when the case law looks at delay, it's common ground that
24 the parties seeking to amend its pleading must explain any
25 delay, and that's the Contrera case. And the explanations

1 for the delay vis-à-vis Citibank Switzerland, given this
2 record, just do not hold water.

3 In their brief, they say that they needed to
4 perform significant diligence to assert particularized
5 knowledge and imputation allegations. There is nothing in
6 this propose amended complaint and the paragraphs about
7 Citibank Switzerland are 82 to 158, that has anything about
8 particularized knowledge vis-à-vis Citibank Switzerland.

9 One thing they do is they reimport from the 2012
10 filing the allegations concerning Mr. Gross and Mr. Leach
11 which they took out in 2016 when they had the opportunity to
12 amend the complaint. Mr. Leach and Mr. Gross were employees
13 of Citigroup based in New York. There is no pleaded
14 connection of these individuals to Citibank Switzerland.

15 And just to show how unrelated it is to what's at
16 issue in this case, this case is about redemptions that
17 occurred during the period April 2004 to April 2006. Their
18 theory about Mr. Leach is that he had knowledge about
19 purported fraud or fraud at BLMIS that he brought with him
20 from Morgan Stanley to Citibank when he joined Citibank in
21 2008.

22 So in other words, it's knowledge that they claim
23 Citibank or Citigroup had that occurred four years, two to
24 four years after the transfers at issue in this case. And
25 so when they tell this Court that they went and they found

1 particularized knowledge allegations as to Citibank
2 Switzerland relevant to this case, it is just not the case.
3 And it's just not true.

4 They also said they needed the time to add "new
5 allegations" to supplement existing claims. There are --
6 and we might, Your Honor, be having a very different
7 conversation or there may be no opposition at all from us
8 had this proposed amended complaint actually had new facts
9 or new evidence about Citibank Switzerland.

10 But there's nothing like that in here. Instead
11 what you have are allegations that are by in large imported
12 from the trustee's -- Trustee Picard's 2010 pleading against
13 other Citi entities again with no connection at all between
14 anything that happened at those Citi entities and anything
15 at Citibank Switzerland, a continent and an ocean away.

16 They otherwise just cite generalized publicly
17 available statements from Citigroup going back more than a
18 decade that Citigroup is "one bank," and so based on that,
19 they say, well, if someone in New York was thinking
20 something, that means Citibank Switzerland was a knowledge
21 defendant. And so given that complete apples to oranges
22 approach, we think this is the kind of gamesmanship that the
23 case law says cannot support and undercuts a motion to
24 amend.

25 Mr. Elsberg says that some of these points we

1 raise really go to futility. They may speak to futility. I
2 think they do. However if a plaintiff comes to a court or a
3 party comes to a court in a case about apples and he says,
4 well, I'm bringing this amendment because I had to do due
5 diligence so I could have these allegations about apples and
6 then the proposed amended pleading has a bunch of
7 allegations about oranges, that does speak to the good faith
8 of the party.

9 And so I think those points have to be considered
10 when one looks at these proposed amended paragraphs that
11 have nothing to do with Citibank Switzerland and clearly are
12 in response to an adverse ruling by this court in Fairfield
13 II, among other cases.

14 Mr. Elsberg said that we need to show an unfair
15 advantage and that -- or an ulterior motive. That's not
16 what the case law says. Bank is very clear, and it follows
17 Vine and like other courts, it says that seriatim pleading
18 is not acceptable and it also says particularly where
19 there's an ulterior motive. But there's not a requirement
20 that there be some ulterior motive.

21 That said, they are deriving an advantage from
22 this conduct. They're getting to propose different theories
23 to the court over time when they could have brought it all
24 together. And in fact, in this pleading, had purported to
25 allege allegations of knowledge vis-à-vis Citigroup that

1 they now say they want to apply to Citibank Switzerland.
2 And they did, I think, get an advantage because their whole
3 approach -- it's kind of parallel to what Mr. Elsberg said
4 about General Electric.

5 General Electric, the parties said I don't need to
6 plead scienter and then had a turnaround when the rulings
7 went against them. Here their view was we can do a
8 wholesale approach to knowledge among all these differently
9 situated defendants in this case because you have ZCM and
10 then you have all the other defendants, from institutions to
11 individuals, that Your Honor read off at the beginning of
12 today's session.

13 So I'm not -- I don't need to do that. And then
14 when they learned they needed to do that, well, now I want
15 to bring in these purported allegations that in fact
16 Citibank Switzerland is somehow a knowledge defendant.

17 So you have that turning and that reacting to an
18 adverse ruling and the use, and I would say misuse of facts
19 that were in their possession that are not new that supports
20 a gamesmanship finding. And so the Court should deny the
21 motion to amend, to add the new allegations as to Citibank
22 Switzerland.

23 THE COURT: Thank you. Anyone else wish to be
24 heard?

25 MR. ELSBERG: Your Honor, may I respond?

1 THE COURT: Yeah. I'm going to let you respond.
2 But I want to know if anyone else wishes to be heard. I
3 will let you respond, Mr. Elsberg, but I really would like
4 you to condense.

5 MR. ELSBERG: Yes, Your Honor. This will be very
6 quick. I'll start with prejudice. They still have made
7 zero showing of prejudice whatsoever. We heard I believe it
8 was Mr. Boccuzzi try to say, no, no, no, actually it might
9 be difficult to get documents or witnesses. Huxtable is the
10 one who put in the affidavit. As I said, it's remarkable
11 because he didn't say they lacked a single document or have
12 any difficulty getting any document or any difficulty
13 getting to any witness. So zero prejudice whatsoever.

14 Bad faith. They still have not identified any
15 ulterior motive or unfair advantage. We just heard from
16 Citi's counsel that we could have amended earlier. Instead
17 we waited. But that's just a veiled argument about delay.
18 He said we could have brought it together, but we waited and
19 did it later. That's a veiled delay argument, and that is
20 insufficient to show bad faith.

21 I'm not going to go through the cases. Counsel
22 read off a litany of cases. We cover them in our brief. I
23 will just say that the case law is clear that just because a
24 plaintiff knows facts that support a later amended
25 complaint, that is not enough to find bad faith, and we cite

1 Primetime 24. We cite Affiliated FM, which says -- grants
2 the motion for leave even though "the defendants had
3 knowledge of relevant information at the time of the initial
4 pleading" because a party "need not prove that they
5 uncovered new facts or law" to receive leave to amend.

6 We cite Randolph v. Duncan, which held that a
7 defendant did not act in bad faith because "the fact that a
8 party may have had evidence to support a proposed amendment
9 earlier in the litigation does not by itself give rise to an
10 inference of bad faith."

11 We also cite In re Bernard Madoff, 560 BR 208,
12 which says -- which held that "an intervening change in
13 pleading standards may justify leave to amend." We also
14 cite the Agerbrink case in our reply at six and also our
15 opening brief at 18, 19 and 20.

16 So another point I'll make is it's worth keeping
17 in mind, Your Honor, that the liquidators have a duty to
18 conserve resources, and acting efficiently is something a
19 liquidator is supposed to do.

20 I'll also say that Citi says there aren't a lot of
21 new allegations against them and they say there must have
22 been some trickery here. What's going on? This all going
23 have been alleged earlier. But Your Honor, you don't know
24 until the end of your diligence what allegations you're
25 going to have. It's not that you wake up one day and you

1 say, "Oh, here are the allegations that I'm going to have
2 against Citi." No. You have to go through the process that
3 I described earlier where we reviewed multiple sources of
4 information. We reviewed complaints, Bloomberg terminal,
5 documents produced by Citco and so on.

6 I'm not going to address the merits argument that
7 Citi made about Mr. Leach and others and about apples and
8 oranges. That's all for a motion to dismiss.

9 And on delay, and then I will wrap up, Your Honor,
10 on delay, you may have noticed that I don't think anybody
11 disputed that nine months was in fact a reasonable amount of
12 time to do the work that we did.

13 And with that, unless you have questions, Your
14 Honor, I will stop here.

15 THE COURT: I don't. Does anyone else have
16 anything else they wish to add? We are going to take a
17 break. It is now 12:25. We will return at 12:45. We're
18 going -- we're going to go into a room. We have to do it
19 from here. you can just stay on your screen. Very good.
20 Everyone, I'm walking away from my desk for a minute. I'll
21 be right back.

22 (Off the record.)

23 THE COURT: Is everyone -- excuse me. Is everyone
24 on? Hello? Good. Popping up, give or take. Mr. Elsberg,
25 Mr. Froot? There's Mr. Froot. There's Mr. Elsberg. Okay.

1 It looks like everybody's popping on. Good. I'm ready to
2 rule.

3 First, let's just -- just a little bit of
4 background. Most of the background facts that I have put
5 together always have come from Fairfield Sentry v.
6 Amsterdam, and that's at 218 Westlaw 3756343. But I have to
7 admit I've summarized them for many of the purposes.

8 So basically the liquidators and the foreign
9 representatives of the plaintiff in this adversary
10 proceeding to this suit, and this is a redeemer action, in
11 that meeting prior to the disclosure of the BLMIS fraud,
12 defendants received payment upon the redemption of shares
13 issued by the Chapter 15 debtors, and these are the redeemer
14 actions. And there's more background on that, Fairfield
15 Sentry, 218 Westlaw 375634, the Southern District of New
16 York, and that's an August 2018 case.

17 And a group of these were removed to remand the --
18 to state court and mandatory under 28 USC and then that was
19 denied and the district court set this up. So we're here as
20 we are today, and I will go through the facts as I see them
21 putting us at this moment.

22 In October of 2018 -- excuse me, October 18, 2011,
23 the court stayed the redeemer actions pending further order
24 of the court due to litigation that was ongoing in the
25 British Virgin Islands. That was the Fairfield v. Theodoor

1 GGC Amsterdam, 1003496. And that was the consolidated
2 docket. And you can find that at electronic case filing 416
3 and 418.

4 On request of the liquidators, the stay was
5 modified and continued, modified and continued on July the
6 19th, 2020 -- '12, excuse me, 2012. And that's a minute
7 order on ECF 799 and a bench ruling attached as an exhibit
8 to the minute order.

9 While the court lifted the stay to allow the
10 liquidators to amend the complaints in the redeemer actions,
11 it also held that the defendants need not answer such
12 amended complaints pending further order of this court and
13 that for all other respects the stay of these proceedings
14 shall continue throughout the foreign representatives'
15 appeal to the English Privy Council and further order of
16 this court. And again, that's from there.

17 And as Judge Lifland had put it, unless and until
18 the foreign representatives receive a favorable ruling on
19 the currently pending appeals in the English Privy Council,
20 there is no need for the parties to race full speed on the
21 path that may ultimately lead nowhere.

22 A second amended complaint was filed on July the
23 21st, 2012 and in July -- excuse me, and in 2013, the
24 defendants agreed. And Judge Lifland was still the judge.
25 The defendants agreed so long as the liquidator seeks leave

1 to amend complaints in the prior amended actions within 60
2 days after the stay is lifted, terminated or otherwise
3 modified in a manner that would allow the liquidator to
4 pursue an application to amend complaints or the court
5 otherwise permits the motion for leave to amend complaints
6 in the prior amended action, the period from the date of the
7 stipulation through the end of the 60-day period being
8 hereinafter referred to as the grace period.

9 No defendant will oppose such proposed amendments
10 of the complaint in any prior amended action on the grounds
11 of untimeliness, undue delay or any purported prejudice
12 resulting from the failure to seek such amendment during the
13 grace period. Defendants expressly reserve all rights to
14 oppose such amendment on any and all other grounds including
15 an amendment of untimeliness, undue delay or any purported
16 prejudice based on the time that passed between the date in
17 which the liquidator's claims accrued and the date of this
18 stipulation. That's at electronic case filing 817.

19 So Judge Bernstein became the judge in January of
20 2014. In July of 2016, Judge Bernstein stated on the record
21 of the hearing that there are issues that can be resolved
22 one way or another that are not going to be litigated anyway
23 in BVI. They can be resolved. That's at electronic case
24 906.

25 The court permitted the proposed amended complaint

1 to be filed and advised that it would consider hearing other
2 threshold issues in the meantime before the sanction issue
3 is decided by the Eastern Caribbean Court of Appeals. File
4 or submit your amended complaints and then you can deal with
5 them on what issues, threshold issues it makes sense to
6 proceed on. There has never been an order of this court
7 terminating the stay. I can't find it. I've looked for it.
8 It's not there.

9 The proposed third amended complaint was filed on
10 September the 13th, 2016. That's as 910, ECF 910. On
11 October the 18th, 2016, the court entered a so order
12 stipulation setting the briefing schedule for motions to
13 leave to amend and motions to dismiss the threshold issue.
14 Again, electronic case filing 918. The hearing date on the
15 motion for leave to amend was determined by the court. The
16 motion for leave to amend was filed on October the 21st,
17 2016.

18 On December the 6th, 2018, the court issued a
19 memorandum decision denying the liquidator's motion for
20 leave to amend with respect to the contract and common law
21 claims except to the extent the pleading or proposed
22 amendment adequately alleges that a particular defendant
23 knew that the NAV asset value as calculated at the time of
24 the redemption payment was mistaken because the funds
25 invested with Bernard L. Madoff Investment Securities,

1 BLMIS, were worthless or near worthless. In that situation,
2 the liquidators may assert a claim to impose a constructive
3 trust on the defendants. That's Fairfield II, 596 BR, at
4 282.

5 After this decision on April the 15th, 2019, the
6 parties entered into sole-ordered stipulations. That's at
7 ECF 224. In that stipulation, the plaintiffs assert -- the
8 plaintiffs asserted that all defendants in this adversary
9 proceeding are knowledgeable defendants. That's ECF 224.

10 In that stipulation, the parties agreed the
11 plaintiff shall file the proposed amended complaints which
12 shall remove the proposed first claim, the proposed second
13 claim, proposed third claim, proposed fourth claim, proposed
14 fifth claim, proposed sixth claim, proposed contract law
15 claims and the proposed 12th claim.

16 To the extent plaintiff seeks to further amend the
17 proposed amended complaints to add new factual allegation,
18 plaintiff shall file a motion for leave to amend attaching
19 that proffered further amended complaint. Moving parties
20 have the right to oppose such request. That is again ECF
21 224.

22 The amended complaint was filed on January the
23 9th, 2020. On September the 17th, 2020, the plaintiffs
24 moved for leave to amend as contemplated by the so ordered
25 stipulation. Instead of opposing the motion to amend, on

1 March the 17th, 2020, the defendants filed a consolidation
2 motion to dismiss.

3 On February the 26th, 2021, the court entered a
4 stipulated order granting the motion to dismiss and denying
5 in part. That's stipulation ECF 287 implementing the
6 Fairfield Sentry 2020 Westlaw 7345988.

7 According to the stipulated order, the following
8 threshold issues remained to be decided by the court: the
9 amendment issue, the constructive trust pleading issue, the
10 proper party issue, the personal jurisdiction issue, the
11 service issue other than as to HSBC Suisse, the receipt
12 issue and any other argument or dismissal upon consent of
13 the consolidated plaintiffs or by order of the court.
14 Electronic case filing 287.

15 On February the 28th, 2021, the case was
16 reassigned to me. This court, faced with stepping into the
17 middle of a litigation over ten years old decided to hear
18 the amendment issues first. To make it cleaner and easier
19 for the court, the court ordered that new motions to amend
20 the complaint be filed and set a briefing schedule to the
21 parties -- for the parties in the redeemer action.
22 Electronic case filing 292.

23 Upon the filing of the motion to amend, on March -
24 - on May the 14th, 2011 -- excuse me, 2021 -- all prior
25 motions -- pending motions to dismiss became moot. Though

1 the motions to amend currently pending before the court --
2 through the motions to amend currently pending before the
3 court, the liquidator seeks to meet the constructive trust
4 requirements announced by the court in Fairfield II. That's
5 at 596 BR 275, by amending their constructive trust claims
6 to supplement or add individualized allegations of
7 defendant's knowledge the falsity of the fund's net asset
8 values. Again, that's cleaned up. But it's at ECF 297.

9 This court has been routinely asked to rule on
10 various motions without these amended complaints.
11 Defendants Zurich Capital Markets and Citibank Switzerland
12 each filed opposition to the motion to amend. Zurich argues
13 that the liquidators have failed to explain the reason for
14 the delay. Excuse me. This whole case been delayed.
15 That's an editorial comment -- in asserting the amendments,
16 have acted in bad faith by delaying amendments for a
17 strategic purpose, have failed to cure deficiencies in four
18 prior complaints and that Zurich will be prejudiced if the
19 motion is granted.

20 The Citi defendants argue that the new
21 allegations asserted that Zurich's knowledge is imputed to
22 them. They argue they are prejudiced by these allegations
23 because they have to rely on Zurich to establish its own
24 lack of knowledge and because they must take discovery of
25 Zurich. They also argue that the allegations have been made

1 in bad faith as the facts have been known since 2012.

2 The liquidators have moved -- let's go to the law
3 now. The liquidators have moved under Federal Rule of Civil
4 Procedure 15. Rule 15 states in relevant part that the
5 party may amend its pleading only with the opposing party's
6 written consent or the court's leave. And the courts have
7 been mandated the courts should freely give leave when
8 justice so requires. That's Federal Rule of Civil Procedure
9 15(a)(2).

10 The mandate that leave to amend is freely given is
11 to be heeded as the plaintiff's deserve an opportunity to
12 test their claims on the merit. Foman v. Davis, 371 U.S.
13 178, the United States Supreme Court.

14 If a court is to deny a motion for leave to amend,
15 it must justify its reasoning. Again, that's in Foman v.
16 Davis. And the Supreme Court, as we've all heard today,
17 provided a non-exhaustive list of example of when a court
18 may wish to deny leave, such as undue delay, bad faith or
19 dilatory motive on the part of the movant, repeated failure
20 to cure deficiencies by amendments previously allowed, undue
21 prejudice to the opposing party by virtue of the allowance
22 of the amendment, futility of the amendment.

23 While undue delay may be reason to deny leave to
24 amend, there is not any timeframe for which a plaintiff must
25 file for leave to amend. That's Chicago v. Citigroup, 659

1 F.2d, Second Circuit 2011, at 208.

2 The district court apparently believed that a
3 motion for leave to replead is not timely unless made in the
4 first instance. Foman makes it unmistakingly clear that
5 there is no such rule. A motion for leave -- and the five-
6 year rule does not exist. A motion for leave to amend may
7 be made during and after trial as well as after the entry of
8 a judgment. Fulmer v. Davis, 371 U.S. 178. Permitting a
9 motion for leave to amend to go forward despite a judgment
10 having been entered.

11 Even though this litigation commenced in 2010, the
12 parties have not been litigating the action for that entire
13 time. The action was stayed in 2011 and at this moment
14 there is no order having been entered lifting that stay.
15 Despite this, the parties have been working on this case
16 while the stay was in place.

17 While the litigation was stayed in this court, the
18 litigation was continued in BVI. The BVI litigation has
19 direct impact in this case and only one claim remains to be
20 litigated, the constructive trust claims against all
21 defendants. The original complaint contained seven claims,
22 if you look at electronic case filing 7.

23 The court finds that no undue delay has occurred
24 in this case. This is a complicated, multiparty litigation
25 with moving parts in many different jurisdictions, countries

1 and jurisdictions. The defendants have been aware of these
2 allegations for years, having negotiated with the plaintiffs
3 many times regarding the amending of the complaint.

4 As to Zurich's arguments that it suffered undue
5 prejudice by having to respond to allegations from events
6 that occurred 18 years ago, this court finds that argument
7 ineffective. Zurich will need to respond to these
8 allegations whether or not the motion for leave to amend the
9 complaint is granted.

10 Neither the plaintiff nor the court have control
11 over whether employees who were making decisions for the
12 company in 2003 are still employed. Zurich has had
13 knowledge of this litigation since 2010, and if they've
14 chosen not to preserve evidence for production in discovery,
15 it may possibly face the consequences at a later stage of
16 this litigation. Its own failure to preserve relevant
17 evidence is not a reason to prevent plaintiff for asserting
18 their case -- plaintiffs from asserting their case.

19 The Citi defendants also filed opposition to the
20 motion. Much of their opposition reads as a motion to
21 dismiss for failure to assert a claim. The court
22 understands that futility can be a sufficient reason to deny
23 a motion to amend. The courts and parties have already set
24 forth a briefing schedule for the remaining threshold issues
25 including motions to dismiss for failure to state a claim.

1 This court is staying with that schedule. The
2 Citi defendants can renew these arguments at the motion to
3 dismiss claim.

4 As to their arguments that they need to take
5 discovery of Zurich, this litigation is at the very
6 beginning stages. Discovery has not been begun as motions
7 to dismiss have not yet been resolved. Despite this,
8 defendants have been part of this litigation since its
9 inception and could have moved at any time to lift the
10 litigation stay in this court. They chose not to do so.
11 they could have filed third-party actions against Zurich.
12 They have not done so. They could have moved this court to
13 permit discovery prior to the completion of the 12(b)(6)
14 motion. They have not done so.

15 So Mr. Elsborg, I didn't find an order lifting the
16 stay on litigation. If not, don't you think we need one?

17 MR. ELSBERG: Yes, Your Honor. We have said at a
18 prior hearing and say again now that we believe that all
19 discovery should immediately go forward.

20 THE COURT: Very good. So any opposition to
21 lifting the stay to litigation.

22 MR. BAMBERGER: Your Honor -- yes, Your Honor.
23 May I be heard on that issue? There's a relatively tortured
24 history to this. There is an order that was entered by
25 Judge Bernstein in 2019. That order continued the stay of

1 discovery. The docket that I have, this is off of docket
2 10-3633. It's document number 81 at page 15, says that in
3 the event a party seeks leave of the court to serve
4 discovery, the nonmoving party shall have the right to
5 oppose any such request.

6 The issue as I see it, Your Honor, is that many of
7 the defendants in his case, most of them, are foreign, will
8 be filing motions to dismiss on the basis of that there's a
9 lack of personal jurisdiction. And many years ago, in 2012,
10 the liquidators made a similar request for discovery of
11 those foreign defendants. That motion was initially granted
12 by Judge Lifland. It went up on appeal to Judge Preska at
13 the district court who ordered that a comity analysis be
14 conducted. And Your Honor has quoted from the opinion of
15 Judge Lifland on remand from that decision.

16 Judge Lifland put in place a stay in part because
17 -- and I can read from that order, Your Honor -- in part
18 because ordering discovery would implicate, as he said, the
19 customer confidentiality laws of no fewer than 30 countries.
20 That issue remains --

21 THE COURT: Okay. Let me just --

22 MR. BAMBERGER: Yeah.

23 THE COURT: Step back.

24 MR. BAMBERGER: Sure.

25 THE COURT: You're getting ahead of what you said.

1 So you're telling me that the stay order doesn't affect
2 discovery and we can move through discovery and we can just
3 go with discovery.

4 MR. BAMBERGER: No, no, Your Honor. I --

5 THE COURT: See. You're slowing it all down. We
6 either lift the stay and go forward, and you're saying the
7 opposite. You can't even do discovery. So we're --

8 MR. BAMBERGER: Right.

9 THE COURT: -- slowing this litigation down even
10 more. For what purpose?

11 MR. BAMBERGER: Because, Your Honor, if discovery
12 is ordered to go forward right now, the next step will be
13 for the plaintiffs to serve discovery on a number of foreign
14 defendants who are not going to be able to comply with those
15 discovery requests in the absence of personal jurisdiction
16 of this court because doing so will constitute a criminal
17 offense under foreign law. And so the next thing Your Honor
18 is going to receive -

19 THE COURT: Well, discovery comes after motions to
20 dismiss, does it not?

21 MR. BAMBERGER: Well, that's fine, Your Honor. We
22 haven't resolve the motions to dismiss yet.

23 THE COURT: That's --

24 MR. BAMBERGER: So if Your Honor is suggesting
25 that we should put off discovery until the motions to

1 dismiss are --

2 MR. ELSBERG: No --

3 THE COURT: No, no. I'm -- I'm -- the stay has
4 nothing to do with staying discovery. Okay. What are you
5 trying to say to me?

6 MR. BAMBERGER: What I'm trying to say to you --

7 THE COURT: I don't know what you're trying to do
8 about the litigation.

9 MR. BAMBERGER: Okay.

10 THE COURT: We've got a litigation here and
11 there's a stay in here. if we --

12 MR. BAMBERGER: Very good.

13 THE COURT: -- want that stay in place --

14 MR. BAMBERGER: Your Honor, we don't have a
15 problem with lifting the stay as long as the stay of
16 discovery that Judge Bernstein put in place following Judge
17 Lifland's decision remains in place pending the motions to
18 dismiss. That's the state of play right now as I understand
19 it, and that's the state of play that I think should
20 continue and --

21 THE COURT: Listen, we have a regular case going
22 now. It's now a normal case. I've ruled in favor, or I'm
23 about to rule in favor of granting this amendment -- this
24 motion.

25 MR. BAMBERGER: Understood, Your Honor.

1 THE COURT: And in a minute, we're going to get
2 rid of every one of the fake defendants. That's -- so
3 that's another -- that's on my agenda.

4 MR. BAMBERGER: Okay.

5 THE COURT: So we now have a regular complaint and
6 we're under the regular rules of civil procedure except for
7 this stay order. I don't see any reason why we're doing
8 bifurcated motions.

9 MR. BAMBERGER: I guess, Your Honor, in order to
10 best address your question --

11 THE COURT: Okay.

12 MR. BAMBERGER: I'd like to understand what Your
13 Honor is getting at in terms of lifting the stay. If Your
14 Honor is referring to lifting the stay and allowing the
15 plaintiffs to move forward with discovery against foreign
16 defendants who cannot comply with those discovery requests
17 and against whom motions to dismiss --

18 THE COURT: That stay was only in place to allow
19 the BVI litigation. BVI has ruled. That's the only reason
20 that stay was in place. If you read it, that's all it says.
21 Now y'all might have been reading a lot more into it than
22 that. But that's all it says.

23 MR. BAMBERGER: It --

24 THE COURT: And that's over. So we're lifting the
25 stay. So what are you saying to me, and who do you

1 represent, by the way?

2 MR. BAMBERGER: Apologies, Your Honor. Nowell
3 Bamberger. I represent -- Cleary, Gottlieb, represent the
4 HSBC defendants.

5 THE COURT: Okay.

6 MR. BAMBERGER: What I'm -- what I'm saying to
7 you, if Your Honor is lifting the stay, is that while the
8 parties intend and I think one of the topics we wanted to
9 discuss with Your Honor was the next phase of this case
10 which, as I understand it, will include addressing personal
11 jurisdiction, an issue that has not been addressed yet in
12 this case and that obviously is a prerequisite for going
13 forward on the claims. Until that issue is resolved, it
14 would be appropriate for discovery --

15 THE COURT: That started next month with service,
16 and I've already touched on that.

17 MR. BAMBERGER: Yeah. Yeah.

18 THE COURT: But for all intents and purposes, this
19 stay has been lifted except the formality because the BVI
20 litigation is over. So we're lifting that stay.

21 MR. BAMBERGER: Understood, Your Honor. In that
22 case, I would just ask for the clarification --

23 THE COURT: There's no clarification. The stay is
24 lifted.

25 MR. BAMBERGER: Understood, Your Honor.

1 THE COURT: That stay was in place for BVI
2 litigation. That's all it said. Now y'all might have made
3 a lot of agreements now and then. But that's all it said.
4 It's over. It's lifted.

5 MR. BAMBERGER: I understand, Your Honor's order.
6 And I suppose that the next thing we should talk about then
7 is what the process is for this case going forward.

8 THE COURT: We may talk about that next month
9 because that's on the agenda for next month. But right now,
10 Mr. Elsberg, I want an order lifting that stay.

11 MR. ELSBERG: Yes, Your Honor.

12 THE COURT: In other words, what that stay was in
13 place for is finished.

14 MR. ELSBERG: Yes, Your Honor.

15 THE COURT: And then next month we talk about
16 service.

17 MR. ELSBERG: Yes, Your Honor.

18 THE COURT: And we've already discussed it once,
19 so -- and I'm aware of that. Okay.

20 MR. ELSBERG: And just to be clear, Your Honor, my
21 understanding with the stay lifted is that we are now free
22 to move forward with discovery.

23 THE COURT: You know what? I'm not going to pre-
24 rule. If somebody wants to come in here, we're running it
25 under the Rules of Civil Procedure.

1 MR. ELSBERG: Yes, Your Honor.

2 THE COURT: Go to the Rules of Civil Procedure.

3 We're playing this game by rules, and you're free to do

4 whatever the federal rules say you're free to do.

5 MR. ELSBERG: Perfect. Thank you, Your Honor.

6 THE COURT: And that's what we're -- that's the

7 game we're playing now.

8 MR. ELSBERG: That's exactly what I was asking

9 for, Your Honor. Thank you.

10 THE COURT: Okay. So for the foregoing reasons,

11 the amendment is granted. And so, you need to get me a

12 proposed order on the issues of this decision about -- for

13 the amendment.

14 MR. ELSBERG: Yes, Your Honor.

15 THE COURT: So you need to get that in. But let

16 everybody see it before you send it. Now then, as to these

17 fake -- I have to go back and address one other thing. And

18 that was that Merrill Lynch issue. There you are, Mr.

19 Asher.

20 MR. ASHER: Thank you, Your Honor. If I may

21 clarify, my intent is --

22 THE COURT: Give me a minute. Give me a minute

23 before you clarify anything. Just let me go back to a note

24 I have because I want to be -- I want to say it clearly, not

25 just off the top of my head. Okay. Okay. I want to put a

1 warning to you, Mr. Asher. I have told you about my stance.
2 If you're representing a client that cannot communicate with
3 you, cannot ask permission to settle and cannot set up
4 signoffs on briefs and pleadings, you don't have a client.

5 And that is truly a grievance under the Rule 9011
6 and under the bar of the state of New York. Now then you
7 may speak. I'm giving you fair warning. And I'm giving any
8 lawyer that says they represent someone that doesn't exist
9 fair warning that. Yes, sir.

10 MR. ASHER: Thank you, Your Honor. I appreciate
11 the opportunity to clarify. I represent Merrill Lynch
12 entities. I do not represent some -- an entity that doesn't
13 exist and, for what you just explained, an entity that
14 couldn't communicate with me.

15 But the Merrill Lynch entities that I do represent
16 have an interest in avoiding the prejudice of the potential
17 default judgment or some other judgment entered against an
18 entity named Merrill Lynch Bank. And so we've attempted to
19 navigate that, and I believe that we've put in our filings
20 consistently that we are -- the undersigned counsel that
21 represents other Merrill Lynch entities maintains that
22 Merrill Lynch Bank does not exist. But I hope that
23 clarifies things. I apologize if I maybe didn't --

24 THE COURT: It does not.

25 MR. ASHER: Oh, okay.

1 THE COURT: You are still susceptible to a
2 grievance committee. If you're standing up in front of me
3 and telling me that this doesn't exist, that means you can't
4 talk to them, you can't do anything and yet you're saying
5 that. That does not explain anything to me.

6 MR. ASHER: Okay.

7 THE COURT: I want you to -- on every one that
8 says there's a fake bank or a fake name, I want a judgment
9 of default and I want it sent up in that way.

10 MR. ASHER: Your --

11 THE COURT: Yes, sir?

12 MR. ASHER: May -- may I? Okay. Thank you. So
13 Merrill Lynch -- I believe that Merrill Lynch have a fair
14 interest in avoiding a scenario where there's an entity
15 named and in the course of discovery, potentially the
16 liquidators realize it's a different entity. There's a
17 motion to amend the name, a separate Merrill Lynch entity.
18 So that's why we've been continuing --

19 THE COURT: Then you can be -- at that moment you
20 can be a party. But at this moment, you can't be and you
21 can't represent a non-entity. And since you cannot
22 represent a non-entity, there's going to be a default
23 entered, not a motion to dismiss, a default entered because
24 at this moment --

25 MR. ASHER: Your Honor --

1 THE COURT: -- you're telling me nobody speaks for
2 it. Mr. Bamberger, I know you've already done one and they
3 agreed with you. I didn't. Yes, sir?

4 MR. ASHER: I'm sorry. Were you referring to the
5 recent voluntary dismissal of a non-existing entity?
6 Because -- because I would hope that is the --

7 THE COURT: Judge Drain's decision.

8 MR. ASHER: Right. And that to us sounds like
9 it's the appropriate course where I don't know what led to
10 that because I'm not involved in that matter, but that a
11 voluntary dismissal without prejudice --

12 THE COURT: When you get retained -- when you get
13 retained -- when you get retained by this entity, you can
14 speak to this court. Until such time, you're not allowed to
15 speak to this court. And I know Cleary did it. That's
16 between the two of them, not me.

17 Your Honor?

18 THE COURT: Yes, sir?

19 Can I -- may I address just very briefly a pointed
20 related to that? There is an entity named as "HSBC" in
21 action 3635 as to which there's a pending motion that will
22 not be fully briefed until Monday. Our reply brief is due
23 on Monday. The circumstances there are a little bit
24 different because the liquidators in that case --

25 THE COURT: Then we will deal with that -- we will

1 deal with that when that's on the agenda.

2 MR. BAMBERGER: I just wanted to make sure Your
3 Honor wasn't addressing that motion before --

4 THE COURT: I --

5 MR. BAMBERGER: I understand, Your Honor.

6 THE COURT: If you are standing up saying that you
7 represent somebody and you've got somebody on the other
8 side, not a fake entity. If it's a fake entity, it's a fake
9 entity. And I've heard y'all. Mr. Levine, did you have
10 something you wanted to add?

11 MR. LEVINE: No, Your Honor. I can't add anything
12 because the entity that I thought I represented doesn't
13 exist, and we've told the liquidator that many times. So I
14 can't say anything other than we will withdraw our motions
15 and our representation of that non-existent entity.

16 THE COURT: Thank you. All right. And then we'll
17 go from there.

18 MR. ASHER: And we'll --

19 THE COURT: Yeah?

20 MR. ASHER: We'll do the same. Thank you, Your
21 Honor.

22 THE COURT: Thank you very much. Okay. If you'll
23 do that, Mr. Elsberg, I need that done. I'm trying to clean
24 up this docket. Let's be honest. There's a lot going on
25 and there's been a lot of litigation that has gone up and

1 there's been a lot of changes and moving parts. And Judge
2 Lifland and Judge Bernstein did a herculean work in making
3 it. now then we're at the stage that a lot of things have
4 been decided by appellate courts.

5 It's time to get down, to get the amended
6 complaints, to get the answers, to get the discovery and
7 then to stand up and say we haven't been -- had time to do
8 discovery and -- not time, we oppose discovery because it's
9 been 18 years. You had a chance to say that you knew the
10 litigation was going on. Let's move forward. Anything else
11 am I missing for today?

12 MR. ELSBERG: No. Thank you, Your Honor.

13 THE COURT: All right. Get those orders in, and
14 I'll see y'all next month.

15 MR. ELSBERG: Thank you, Your Honor.

16 MR. ASHER: Thank you, Your Honor.

17 THE COURT: Good to see everybody.

18 MR. ELSBERG: Good to see you.

19 THE COURT: And Mr. Levine, may I say good to see
20 you in good health.

21 MR. LEVINE: Thank you, Your Honor. Yes. It's
22 been fine since the recovery and no follow-up problems.

23 THE COURT: Thank you. I'm glad to hear that. So
24 no long-term --

25 MR. LEVINE: Thank you for saying something.

1 THE COURT: So no long-term?

2 MR. LEVINE: Nothing long-term that I can perceive
3 now. Maybe 10 years from now, I'll find out about it. But
4 who knows?

5 THE COURT: Right. Right. Good. Well, it was
6 really good to see you.

7 MR. LEVINE: Thank you, Your Honor.

8 MR. ELSBERG: Thank you, Your Honor.

9 THE COURT: All right, everyone. Take care.

10 MR. ELSBERG: Bye-bye.

11 MR. FROOT: Thank you, Your Honor.

12 (Whereupon these proceedings were concluded)

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I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

Digitally signed by Sonya Ledanski
Hyde
DN: cn=Sonya Ledanski Hyde, o,
ou, email=digital@veritext.com,
c=US
Date: 2021.08.04 14:43:56 -04'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: July 30, 2021

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